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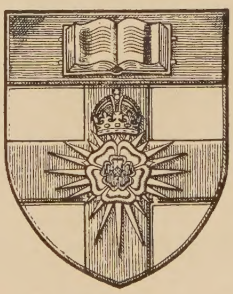

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THE

LAW REPORTS.

Court of Exchequer.

REPORTED BY

JAMES ANSTIE AND ARTHUR CHARLES,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. V.

FROM MICHAELMAS TERM, 1869, TO TRINITY TERM, 1870,
BOTH INCLUSIVE.
XXXIII VICTORIA.

LONDON:
PRINTED FOR THE COUNCIL OF LAW REPORTING
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.
1870.

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CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXIII VICTORIA.

GEORGE AND WIFE *v.* SKIVINGTON.

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Nov. 15.

Husband and Wife, Action by—Injury caused to Wife arising out of Sale of Goods to Husband for her use—Scienter—Negligence as a Tradesman—Selling Goods of Deleterious Quality.

The plaintiffs, J. G. and his wife E. G., by their declaration alleged that the defendant, in the course of his business, professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, without causing injury to the person using it, and to have been carefully compounded by him; that the plaintiff J. G. thereupon bought of the defendant a bottle of this hair wash to be used by the plaintiff E. G., as the defendant then knew, and on the terms that it could be safely so used, and had been carefully compounded. Breach, that the defendant had so negligently and unskilfully conducted himself in preparing and selling the hair wash, that by reason thereof it was unfit to be used for washing the hair, whereby the plaintiff E. G., who used it for that purpose, was injured. On demurrer:—

Held, that the declaration disclosed a good cause of action.

Langridge v. *Levy* (2 M. & W. 519; in Ex. Ch. 4 M. & W. 337), commented on.

DECLARATION, by Joseph George, and Emma his wife, that the defendant carried on the business of a chemist, and in the course

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of such business professed to sell a chemical compound made of ingredients known only to the defendant, and which he represented and professed to be fit and proper to be used for washing the hair, which could and might be so used without personal injury to the person using the same, and to have been carefully and skilfully and properly compounded by him, the defendant; and thereupon the plaintiff, Joseph George, bought of the defendant, and the defendant sold to him at a certain price, a bottle of the said compound, to be used by the plaintiff Emma for washing her hair, as the defendant then knew, and on the terms that the same then was fit and proper to be used, and could be safely used, by her for the purpose aforesaid, without personal injury to her, and had been skilfully, carefully, and properly compounded by the defendant; yet the defendant had so unskilfully, negligently, and improperly conducted himself in and about making and selling the said compound, that by the mere unskilfulness, negligence, and improper conduct of the defendant, the said compound was not fit or proper to be used for washing the hair, nor could it be so used without personal injury to the person using the same; by which premises the plaintiff Emma, who used the said compound for washing her hair, pursuant to the terms upon which the same was sold by the defendant, was by using the same injured in health, &c.

Demurrer, and joinder.

Nov. 10, 15. *H. W. Lord*, in support of the demurrer. The plaintiff, Emma, the wife of the plaintiff Joseph George, is the meritorious cause of action, her husband being joined for conformity. But the declaration discloses no facts on which a legal duty on the defendant's part towards her can be raised. It is not alleged that the defendant *knew* the compound he manufactured and sold was unsuitable for the purpose it was bought for; and the absence of this allegation distinguishes the case from *Langridge* v. *Levy*. (1) There is no *implied* warranty that an article sold by a tradesman to a customer shall be fit for the purpose for which it is sold: *Emmerton* v. *Matthews* (2); but if that be so, à fortiori, there is no duty cast upon the tradesman towards a stranger to the

(1) 2 M. & W. 519; in Ex. Ch. 4 M. & W. 337.

(2) 7 H. & N. 586; 31 L. J. (Ex.) 139.

contract of sale, and he cannot be made liable at the suit of a stranger who has been injured by using the article sold, unless he *knew* that the article was deleterious: *Longmeid* v. *Holliday* (1); *McFarlane* v. *Taylor*. (2)

Ingham, in support of the declaration, was not called on.

KELLY, C.B. I am of opinion that our judgment should be for the plaintiffs. The facts alleged by the declaration are shortly these;—that the plaintiff, Joseph George, purchased a chemical compound of the defendant as a hair wash for the use of his wife, which was made up of ingredients known only to the defendant, and by him represented to be "fit and proper to be used for washing the hair;" and there is also an express statement that the defendant knew the purpose for which the article was bought. The declaration further alleges that the defendant "so unskilfully, negligently, and improperly conducted himself in and about selling and making the said compound" as to cause the damage complained of to the female plaintiff. Now, under these circumstances, the question is whether an action at the suit of the plaintiff, Emma George, her husband being joined for conformity, will lie. It is contended that it will not. There was no warranty, it is said, either express or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being, not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and so sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought. There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured. And I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it

(1) 6 Ex. 761. (2) Law Rep. 1 H. L., Sc. 245.

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extends, in my judgment, to the person for whose use the vendor knew the compound was purchased. In *Langridge* v. *Levy* (1), the defendant sold a gun to the plaintiff's father for the use, to his knowledge, of the plaintiff, and it was held that a duty arose towards the plaintiff that the gun should be safe; and here a similar duty arose towards the person who was known to the defendant to be about to use this wash; namely, a duty that the article sold should be reasonably fit for the purpose it was bought for and compounded with reasonable care. Under these circumstances, there being in the declaration a direct allegation of negligence and unskilfulness, our judgment ought to be for the plaintiffs. With regard to *Longmeid* v. *Holliday* (2), that case is entirely distinguishable, for there the jury found bona fides and no negligence on the part of the vendor. My Brother Channell (3) wishes me to add that he concurs in this judgment.

PIGOTT, B. I am of the same opinion. The action is, in effect, against a tradesman for negligence and unskilfulness in his business. Such an action by the purchaser himself is clearly maintainable. Then, where the thing purchased is for the use not of the purchaser himself but, to the defendant's knowledge, of his wife, does the defendant's duty extend to her? I can see no reason why it should not. She cannot contract for herself alone, but that is no reason why the defendant's duty should stop short of her. The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable. That, however, is widely different from this case; for, here, there is an express allegation that the defendant knew the purpose for which, and the person for whom, this compound was bought.

CLEASBY, B. I also think the declaration shews a good cause

(1) 2 M. & W. 519; in Ex. Ch. 4 M. & W. 337.

(2) 7 Ex. 761.

(3) Channell, B., had left the court at the close of the arguments.

of action in the female plaintiff. No person can sue on a contract but the person with whom the contract is made; and this undoubted proposition was attempted to be taken advantage of in *Langridge* v. *Levy*. (1) The answer was that, admitting the proposition to be true, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor. It was therefore held in that case that the boy who used the defective gun, and for whose use the defendant knew it was destined, had a good cause of action. Substitute the word "negligence" for "fraud," and the analogy between *Langridge* v. *Levy* (1) and this case is complete. The real question is whether the allegations in the declaration are sufficient to raise a duty towards the female plaintiff. Now it is alleged that the defendant himself manufactured this wash of ingredients known only to him, and that he held it out and professed it to be of a certain quality, and it was not of that quality; and that he knew it was purchased for the purpose of being used by the female plaintiff. Under the circumstances I think there was a duty imposed upon him to use due and ordinary care, and of the breach of that duty I am of opinion the female plaintiff, who was injured, can take advantage. The two things concur here; negligence and injury flowing therefrom. There was, therefore, a good cause of action in the person injured similar to that which was held to be good in *Langridge* v. *Levy*. (1)

Judgment for the plaintiffs.

Attorney for plaintiffs: *J. M. Dobson.*
Attorneys for defendant: *Hore & Sons.*

(1) 2 M. & W. 519; in Ex. Ch. 4 M. & W. 337.

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Nov. 15.

WHITEHOUSE AND ANOTHER *v.* THE WOLVERHAMPTON AND WALSALL RAILWAY COMPANY.

Railway Company—Railway Clauses Act, 1845 (8 *Vict.* c. 20), *s.* 81—*Compensation to Mine Owner—Future but ascertainable Expenses and Losses—Expenses payable "from Time to Time."*

By s. 81 of 8 Vict. c. 20, it is enacted that a railway company shall "from time to time pay to the owner, lessee, or occupier, of mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner," &c., by reason of the severance of the surface land or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway; and in case of dispute as to the amount of "such losses or expenses," the same shall be settled by arbitration:—

Held, that an arbitrator appointed to assess, under this section, the losses or expenses sustained and incurred by a mine owner by reason of his land being severed and the working of his mines being interrupted, rightly included in his award items of compensation for additional losses or expenses not then actually sustained or incurred, but which would necessarily be sustained or incurred in working the mines, and which were capable of being immediately estimated with reasonable certainty.

SPECIAL CASE.

The plaintiffs are lessees of lands in the parish of Wolverhampton, under different landlords and for various unexpired terms (1), and the defendants are a railway company incorporated under the "Wolverhampton and Walsall Railway Acts" of 1865 and 1866, and the public Acts to be read therewith, among which are the Lands Clauses Act, 1845 (8 Vict. c. 16), and the Railway Clauses Act, 1845 (8 Vict. c. 20). In April, 1860, the defendants gave due notice that they would require to purchase the plaintiffs' lands for the purposes of their undertaking, and that they were willing to treat for the purchase, and also as to the compensation to be paid for damage sustained by reason of the execution of the works. They also demanded in the usual manner particulars of the plaintiffs' interest, which were accordingly supplied to them. Eventually, neither the parties themselves, nor the arbitrators appointed by them, being able to agree on the amount of compensation payable, the matter came before an umpire, who awarded to the plaintiffs 1500*l.* "for and in respect of the said lands and their interest

(1) The case did not find for how long the several leases had been respectively granted.

therein, and for and in respect of all damage sustained by them by reason of severance and otherwise, and by reason of the execution of the works" authorised by the defendants' Acts.

It was objected before the umpire, on behalf of the defendants, that the damage in respect of which compensation was claimed was of such a description that the plaintiffs were not *at present* entitled to recover, but that they must wait until the losses and expenses in respect of which such compensation was claimed had been actually sustained and incurred; and the umpire was requested to raise the question on the face of his award, which he did by stating the facts found by him as follows:—

The lands of the claimants (the plaintiffs), consisting of five holdings, lie contiguous to each other, and the land taken by the defendants is a narrow strip crossing them all in a straight line and made up of a part of each. The lands have been taken by the claimants for mining purposes only, and in all, the mines have been partly got. The process of mining was going on when the defendants gave their notice to take the land, but a large portion of the minerals was still ungotten in places where the workings had not reached. The five holdings taken as a whole are cut into two parts by the railway, which crosses them on an embankment, one part lying to the north the other to the south. The workings were progressing from south to north, and those which had taken place were all in the part to the south, but were approaching, and in one place were very near, the railway, and in the ordinary course, and before the expiration of the claimants' interest, if the railway had not interfered, would soon have reached and passed to the north of the land taken by the railway. At the time the defendants gave their notice, the period was approaching when it would be necessary to sink two pits for the purpose of getting the minerals in the north part, and, in fact, the spot where one of these pits was to be had been marked out by the claimants before the defendants took the land. The site was in the centre of the line, and it therefore became necessary to sink the pit elsewhere, and the only proper place for sinking it was to the north of the railway.

The claimants had an engine to the south of the line, by which the pit, if sunk, as proposed at first, in the centre of the land

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taken, could have been worked; but the pit, which had now become essential, could not be worked by that engine, but a new engine and plant would be wanted on the north side, and the expense of working the new engine would have to be incurred in addition to that of working the old one, which was still necessary for the workings on the south side of the railway. Besides the substituted pit on the north side, the defendants' works (it was found) would involve the necessity of sinking another pit on the south side for the purpose of depositing spoil, which there would be no room to deposit on the north side as before, owing to the insufficiency of the space left by the defendants. It would also be needful for the plaintiffs to acquire some additional surface room for the spoil.

In consequence of the railway coming where it did, and dividing the surface of the lands into two parts, there would also necessarily be incurred an extra expense when the proposed pit on the north side of the railway came to be worked, partly from its being necessary to raise the pit frames higher than would otherwise have been necessary, and partly from the necessity of carrying the spoil to a greater distance to deposit it than would otherwise have been necessary.

The sum of 1500*l.* awarded under the above circumstances was made up of, first, 10*l.* for the claimants' interest in the land; secondly, 270*l.* for the new engine and plant; thirdly, 840*l.* for the expense of working the same for the time during which it will be an extra expense. [This item was stated by the umpire, in a supplemental case, not to include the expense of working by the engine of any part of what was under the railway or within forty yards of it, i.e., within the limit within which a railway company can prevent mines being worked: see 8 Vict. c. 20, s. 78]. Fourthly, 180*l.* for the new pit to the south of the railway; fifthly, 120*l.* for the extra expense of raising pit frames and depositing spoil; sixthly, 80*l.* for the expense of acquiring fresh spoil land. At the time when the defendants gave their notice to treat, no part of the money awarded in respect of expenses had been *actually* spent, nor had the expenses been incurred, but the necessity for them was foreseen, and the amount and how far it would diminish the value of the property was capable of being ascertained with reasonable certainty. The defendants objected to all the heads of compensation, except the

first, on the ground that the plaintiffs could not *then* claim in respect of any of them under the Railway Clauses Act (8 Vict. c. 20), s. 81.

The question for the opinion of the Court was, whether compensation had been properly awarded in respect of all or any of these expenses.

The Railway Clauses Act (8 Vict. c. 20) contains, ss. 77—85, various provisions "with respect to mines lying under or near the railway." Amongst these it is enacted, by s. 81, that "the company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier, by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of the making and maintaining the railway; and if any dispute or question shall arise between the company and such owner, lessee, or occupier as aforesaid touching the amount of such losses or expenses, the same shall be settled by arbitration."

Matthews, Q.C. (*J. O. Griffits* with him), for the plaintiffs. All the items are "expenses and losses" caused by the severance of the lands, and the only question is, whether under s. 81 of 8 Vict. c. 20, which provides for payment of compensation to the owner "from time to time," the plaintiffs must wait until such expenses and losses have been actually incurred. Such a construction would lead to the inconvenience of repeated actions at short intervals, and the words do not require it. Expenses or losses not incurred, but capable, as here, of present estimation with reasonable certainty, are payable at once and for all. In *Rex* v. *Leeds and Selby Ry. Co.* (1) the company were required "from time to time" to summon a jury to assess compensation; but it was there held that a claim similar to this ought to have been brought forward in the first instance, when the land was purchased; and Littledale, J.,

(1) 3 Ad. & E. 683.

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says (at p. 690): "It may be true that in that case the proprietor of the mine might have got compensation for what he did not ultimately want. That, however, cannot be helped. It would be very inconvenient if a party could be continually claiming fresh compensation from time to time." And in *Croft* v. *London and North Western Ry. Co.* (1), a case under the Lands Clauses Act, 1845 (8 Vict. c. 16), s. 68, where damages were claimed for the "injuriously affecting" the plaintiff's land, Crompton, J., says: "I think it quite clear that compensation must be once for all—as far as regards foreseen damages." The same principle applies to the "expenses and losses" of the present plaintiffs, who are entitled to the compensation awarded as well under 8 Vict. c. 16, s. 68, as under 8 Vict. c. 20, s. 81. [He also cited *Lee* v. *Milner* (2); *Caledonian Ry. Co.* v. *Lockhart* (3); *Bagnall* v. *London and North Western Ry. Co.* (4); *Great Western Ry. Co.* v. *Bennett* (5)].

Macnamara (*Holl* with him), for the defendants. The compensation is claimed, not under 8 Vict. c. 16, s. 68, but under 8 Vict. c. 20, s. 81. The latter section expressly enacts that compensation shall be paid "from time to time," and does not contemplate any payment for *prospective* losses or expenses. The case finds no *present* necessity for the various works mentioned, but only an *approaching* necessity. Possibly the mines to the north may never be worked at all, and then compensation will have been given for expenses that will never at any time be incurred. In *Rex* v. *Leeds and Selby Ry. Co.* (6) the claim was for a sum spent in repairing damages done to the defendants' railway. This was held not the subject of compensation at all, as the plaintiff was bound to repair such damage. The language, also, of the special Act there, differs considerably from that of 8 Vict. c. 20, s. 81. The company are required "from time to time" to issue their warrant, and the jury are to assess compensation "either for the damages which shall before that time have been done or sustained, or for the future temporary, or perpetual, or for any recurring damages." Here the words are simply for

(1) 3 B. & S. 436, 455; 32 L. J. (Q.B.) 113, 121.
(2) 2 M. & W. 824.
(3) 3 Macq. 808.
(4) 1 H. & C. 544; 31 L. J. (Ex.) 480.
(5) Law Rep. 2 H. L. 27.
(6) 3 Ad. & E. 683.

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such expenses and losses "as shall be incurred." *Lee* v. *Milner* (1) is distinguishable on a similar ground. *Croft* v. *London and North Western Ry. Co.* (2) was not a case of mines but of ordinary damage caused by subsidence. *Bagnall* v. *London and North Western Ry. Co.* (3) is in the defendants' favour. Willes, J., says there, "There are practical obstacles of an insuperable character, against saying that there arises upon the making of the railway an immediate right to compensation in respect of possible injury to unopened mines." But here the north side is in fact an unopened mine. In *Great Western Ry. Co.* v. *Bennett* (4) Bennett had suffered an actual loss. The true rule is that, until actual loss or expense has been sustained, or at least till an absolute present necessity for expense is shown, compensation is not payable. At all events it is not payable where the Act expressly says it shall be paid "from time to time;" an expression the fair meaning of which is "as the damage to be compensated accrues, and not before." In *Caledonian Ry. Co.* v. *Lockhart* (5) Lord Wensleydale, after laying down the principles on which compensation ought in general to be assessed, adds: "These observations do not apply . . . where, by the express terms of the special Acts, compensation for damages *from time to time* sustained is payable."

KELLY, C.B. The statements in this special case are somewhat complicated and not altogether so definite as might have been desired, but we must deal with them as best we can. Our difficulties are increased by the circumstance that there is no judicial interpretation of the terms of 8 Vict. c. 20, s. 81. But in the absence of authority I think the only conclusion to be arrived at on all the facts of this case is, that the expenses included in the award must have been necessarily incurred within a short time, if the workings of the mine were to be continued. This being so, the question is whether the plaintiffs can recover these expenses *at once*, before they have actually been incurred by them? Now s. 81 says that the company shall "from time to time" pay to the owner, &c., of mines

(1) 2 M. & W. 824.
(2) 3 B. & S. 436; 32 L. J. (Q.B.) 113.
(3) 1 H. & C. 544, 546; 31 L. J. (Ex.) 480, 481.
(4) Law Rep. 2 H. L. 27.
(5) 3 Macq. 808, 825.

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extending on both sides of the railway "all such additional losses or expenses as shall be incurred" by such owner, &c., by reason of the severance of the lands lying over such mines; and it is argued that wherever expenses have not been actually incurred out of pocket, or where circumstances do not exist leading to the inference that they will be so incurred forthwith, the party injured must wait before he asks for compensation; and on this ground, that it may be the expenses will never be incurred at all. I agree with this contention to this extent, that where it appears uncertain whether the expenses will ever be incurred or where it appears that a long time will elapse before any actual outlay, the mine-owner may perhaps be obliged to wait before he can make his claim successfully. Here, however, the mines were actually being worked, a pit had been sunk, a steam engine was in operation: and the question is, whether the additional expenses of working the mine on the north side are immediately recoverable. It is clear that on that side there were minerals not yet won, and if never likely to be won then the argument for the defendants would have much force. But, from the facts stated by the arbitrator, I think we must conclude that the mines on the north would soon be worked. He says, "The workings were progressing from south to north . . . and were approaching, and in one place were very near to the railway; and in the ordinary course, if the railway had not interfered, would have soon reached and passed to the north of the land taken by the railway." And we must interpret this language to mean that the miner would soon be under and then beyond the railway to the north. And the case goes on to state that "the time was approaching when it would be necessary to sink two pits for the purpose of getting the minerals in the north part, and, in fact, the spot where one of these pits was to be sunk had been considered," and was in the centre of the defendants line of railway. We must take it, therefore, that the mines were, at the time of the award, actually being worked to a point where they were intercepted by the defendants' line. This, then, is a case where the railway company have stopped the mine and rendered it necessary for the plaintiffs to sink a new pit in order to work the north side: and I am of opinion that the expense of sinking it was one which we must conclude was about to be

incurred, and was within the words of s. 81, as being an additional expense or loss, which would be incurred by the mine-owner by reason of the severance of the lands. Next, with regard to the large item of expense in working the engine on the north side, the arbitrator has expressed his opinion that on the facts before him that expense would have to be incurred by the plaintiffs, and although it is to be regretted that he has not stated the length of time for which the engine would be required, still, we may take it that there was evidence before him to enable him to compute with reasonable certainty the entire amount which the plaintiffs would have to pay for this purpose. This, therefore, is either an outlay which the owner is entitled to be paid at once, and which would diminish the price he would otherwise receive from a purchaser, or else it is one for which the occupying tenant or purchaser must presently bring his action. But, on the latter alternative, when is the action to be brought? Is it to be brought daily, weekly, monthly, or at the end of the period for which he may have leased the property? It is impossible to lay down a rule. In a case where there was a regular continuous expense incurred not capable of present estimation, it might be that the occupier would be left to his remedy from time to time after his actual outlay. But I do not think that this construction ought to be put on the section where the expense, though not actually incurred, is capable of immediate ascertainment. In the latter case I think it can be recovered at once.

It is unnecessary to go through the other items in detail. It is enough to say that they are all incidental to the proper working of the mine and capable of instant estimation. All of them come, at all events, within the meaning of the word "losses" in s. 81, if not within that of the word "expenses." I am therefore of opinion, looking at the facts stated in this special case, and not wishing to lay down any broad or general rules, that the plaintiffs are entitled to our judgment.

PIGOTT, B. I have felt considerable doubt during the argument, but in the result I also think the plaintiffs are entitled to our judgment. The arbitrator has found in effect that the expenses in question were imminent and ascertainable, and it only remains

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therefore to ask whether 8 Vict. c. 20, s. 81, contemplates that such expenses should be assessed and paid before they have actually been incurred. I am of opinion that, giving a reasonable latitude to the words used, they do include expenses not actually incurred, provided they be, as here, imminent and capable of present ascertainment. A contrary construction would certainly be very inconvenient, and would lead to mine occupiers being obliged to make claims almost de die in diem. The words are, not "expenses or losses which have been incurred or sustained" but, "expenses or losses which *shall* be incurred or sustained," and the construction we place upon them is, I believe, in accordance with their true meaning and with the intention of the legislature.

CLEASBY, B. I am of the same opinion. The question is, whether the plaintiffs are, under the circumstances stated, entitled to have compensation awarded to them before having actually paid the expenses which the defendants' works will cause them. I think that they are. Take an extreme case. Suppose the owner of a narrow strip of land and minerals determines that, in consequence of the railway works, he cannot work his mine at a profit, and claims to be paid for the land. Then, before the arbitrator, the railway company might contend that he was wrong, and that he could work the mine at an additional expense, say of 500*l*. If this contention prevailed, the mine-owner, according to the defendants' argument, would get nothing at all; but, in order to be compensated, would have to lay out money on works which he believes could not be remunerative. I do not think that a construction of the Act of Parliament leading to such a result can be the true one. It cannot be that the mine-owner is bound actually to spend the money he seeks to recover before he can establish his claim. It is enough if he shews he will necessarily have to spend it. This view of the case is confirmed by another portion of s. 81, which enacts that the mine-owner is to be paid, among other things, the additional expenses caused by reason of the mine being worked "in such manner and under such restrictions as not to prejudice or injure the railway." Can *these* losses be recovered before he has worked his mine, so as to prejudice the railway; or is he obliged to prejudice the railway before he gets them? This is a good test of the present

question. Surely he is not bound to incur liability by injuring the railway company before he can recover them.

The case of *The Cromford Canal Co.* v. *Cutts* (1) really determines this case. There an injunction was applied for to prevent a mine-owner from proceeding against the canal company for compensation for the restriction placed on his rights by their special Act, it being alleged that the damage sought to be recovered had not been actually sustained; but Lord Cottenham (reversing the decision of the Vice-Chancellor), held that though the injury complained of had not been actually sustained, still, inasmuch as an injury capable of approximate estimation had been suffered, there was therefore a right to compensation. He says "the owner of land may work and carry away the coal, provided he does no harm to the canal in getting it. That is a restriction on his right; whether the company purchase the coal or not he is restricted from getting it if he thereby injure the canal." These words support the construction that the word "losses" may well apply to injuries sustained by the restriction of a man's right over his own property. I am, therefore, of opinion that the plaintiffs, having made out a loss, are entitled to the compensation awarded, and that our judgment must be for them.

Judgment for the plaintiffs.

Attorney for plaintiffs: *J. Needham.*
Attorneys for defendants: *Underhill & Field.*

(1) 5 Railw. Cas. 442.

1869
Nov. 8.

CONYBEARE *v.* FARRIES.

County Court Appeal—Costs—Misdirection by Judge of County Court.

On an appeal from a county court, costs will not be refused to the successful appellant merely on the ground that the appeal has been rendered necessary by the misdirection of the Judge.

Gee v. *Lancashire and Yorkshire Ry. Co.* (6 H. & N. 221; 30 L. J. (Ex.) at p. 18), not followed.

THIS was an appeal from the decision of Mr. Commissioner Kerr, judge of the City Court, upon the question whether a notice to the defendant to produce "all letters relating to your tenancy of a room, &c.," included a letter which, with the plaintiff's reply, constituted the tenancy. One letter was specified in the notice, which was written during the tenancy, and it was contended that this limited the notice to letters written after the commencement of the tenancy. The learned commissioner held the notice insufficient, and nonsuited the plaintiff, who appealed.

THE COURT was of opinion that the notice was sufficient (1), and that there must be a new trial.

C.S.C. Bowen asked for the costs of the appeal, relying on *Schroder* v. *Ward* (2), where, in a considered judgment, the Court of Common Pleas dissented from the rule laid down in this Court in the case of *Gee* v. *Lancashire and Yorkshire Ry. Co.* (3), and held, that in appeals from the county courts, the successful party ought in all cases to have costs of the appeal, notwithstanding the necessity for the appeal was occasioned by the misdirection of the judge.

Kemp, contrà.

THE COURT (Kelly, C.B., Channell, Pigott, and Cleasby, BB.) gave costs to the appellant, but declined to lay down any general rule, holding that it was a matter of discretion in each case.

Attorney for plaintiff: *Pain.*

Attorney for defendant: *Jones.*

(1) See Tayl. on Ev. s. 413.

(2) 13 C. B. (N.S.) 410; 32 L. J. (C.P.) 150.

(3) 6 H. & N. at p. 221; 30 L. J. (Ex.) at p. 18.

MANN *v.* HARBORD AND ANOTHER. 1869

Nov. 13.

Costs—Taxation of Costs—Provisional Entry of Cause at Assizes—Appeal from Master—Costs in the Cause—Judge's Discretion—Reg. Gen., Mich. Term, 1867—Commission to Examine Witnesses abroad—Legal Advice—Letter of Instructions.

In pursuance of an order for facilitating the entry of causes at the Lancashire assizes, the plaintiff's cause was *provisionally* entered for trial. Before the commission day proceedings were stayed, the defendants having obtained a commission to examine witnesses abroad. The commissioners were empowered to put questions, vivâ voce, in addition to written interrogatories; and, in order to aid them in the execution of their duty, a letter of instructions was sent to each of them by the plaintiff's attorneys, stating the facts of the case and the points in dispute between the parties, to which the evidence should be directed. The plaintiff, on the return of the commission, again entered the cause provisionally for trial at the assizes, but the defendants having withdrawn their pleas, the record was withdrawn and judgment for the plaintiff subsequently signed. On taxation, the master disallowed the costs incidental to the provisional entries of the cause for trial and to the letter of instructions:—

Held, that he was wrong, and that the plaintiff was entitled to them as costs in the cause.

The Reg. Gen., Mich. Term, 1867, provide (among other things) that the costs of an appeal at chambers from a master to a judge shall be in the judge's discretion. On an appeal by the defendants from a master's decision, refusing to allow a commission to issue, the judge made a special order, in effect reversing the master's decision, but made no order as to the costs of the appeal, which the master disallowed on taxation:—

Held, that the master was right, and, in the absence of an express order by the judge, the costs of the appeal could not be recovered by the plaintiff as costs in the cause.

Nov. 3. *Herschell* obtained a rule calling on the defendants to shew cause why the master should not review the taxation of the plaintiff's costs under the following circumstances:—

On the 17th of March, 1869, the cause was entered *provisionally* for trial at the spring assizes, then approaching, for Liverpool, which were fixed to commence on the 20th. (1) Before the com-

(1) At the spring assizes in 1868, the judges travelling the northern circuit made an order "for facilitating the entry of causes for trial" in South Lancashire, whereby it was, among other things, provided that "causes for trial at Manchester and Liverpool respectively may be entered provisionally at the office of the acting prothonotary and associate at Preston, on such days previous to the commencement of each assizes as may by the acting prothonotary and associate be appointed in that behalf:" and further, that "causes

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mission day an order for a commission to examine witnesses in India, and for a stay of proceedings in the meantime, was obtained by the defendants from a judge at chambers in London. One of the masters had been applied to in the first instance by the defendants to make this order, but he had refused to do so. Thereupon the defendants appealed, and the master's decision was in effect reversed by Mellor, J., who directed a commission to issue, subject to certain conditions as to costs, and to be returned in time for the cause to be tried at the summer assizes; and all proceedings were stayed accordingly. The order was silent on the question of the costs of the appeal, which, by Reg. Gen., Mich. Term, 1867, are "in the discretion of the judge." The commission empowered the commissioners to put questions, vivâ voce, in addition to written interrogatories. In order to guide the commissioners in the discharge of their duties, the plaintiff's attorneys sent out to each of them a letter of instructions, stating in detail the facts of the case and the points in dispute between the parties, to which the evidence should be directed. On the return of the commission, shortly before the summer assizes, the plaintiff again entered the cause for trial, provisionally, but on the day before the commission day the defendants withdrew their pleas, whereupon the record was withdrawn, and judgment was signed by the plaintiff for an agreed sum in respect of the claim in the action, and for costs.

On taxation, the master refused to allow the plaintiff the costs incidental to, first, the provisional entries of the cause at the Liverpool spring and summer assizes; secondly, the appeal to the judge from the master's decision; and, thirdly, the letters of instruction to the commissioners.

Nov. 13. *Lord* shewed cause. As to the first and third set of items disallowed, the Court will not interfere with the master's discretion. The plaintiff cannot complain of having to pay costs incidental to steps taken by him, not necessarily, but merely to secure a high place on the list for his cause. In *M'Kune* v. *Smith* (1)

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entered provisionally, shall stand in the list as actually entered for trial, unless withdrawn before the commencement of the entry on the commission day at the assizes. No cause which shall be withdrawn shall be re-entered without leave of the Court or a judge."

(1) 2 M. & W. 85.

costs, under similar circumstances, were disallowed by the master, and the Court declined to review his decision. With regard to the letters of instruction, the facts are similar to those in *Potter* v. *Rankin* (1), where the costs of legal assistance to commissioners were disallowed. As to the second set of items, the master's decision is right. It is true the ~~plaintiff~~ succeeded on the appeal, but the judge, in the exercise of his discretion, made no order as to costs, and the plaintiff, therefore, cannot claim them as "costs in the cause."

Herschell, in support of the rule. The whole object of the power given to enter causes provisionally will be lost if the costs of the provisional entries are not to be allowed.

[THE COURT intimated that they were satisfied that on this point the rule ought to be made absolute.]

Secondly. There was no need for the judge to make any order as to the costs of the appeal. The costs are in his discretion, but where he says nothing about them it is equivalent to his saying that they are to be "costs in the cause." In *Pugh* v. *Kerr* (2), Alderson, B., observes that, "There is no doubt that the costs of all interlocutory proceedings in a cause, not otherwise specially provided for by the Court, are, according to the practice of the Courts, costs in the cause;" and under this rule the plaintiff is entitled, the order being silent, to the costs of the appeal as costs in the cause.

[PIGOTT, B. The judge should have been asked to exercise his discretion by certifying.]

He has in effect exercised it by his silence. The case of an appeal stands on exactly the same footing as that of an ordinary summons.

[CHANNELL, B. The rules regulating the jurisdiction of masters at chambers expressly provide that the costs of an appeal are to be in the judge's discretion.]

No doubt the judge might have made them, if he thought fit, plaintiff's or defendants' costs in any event, but not having done so the principle referred to in *Pugh* v. *Kerr* (2) applies.

Lastly. The costs of the letters of instruction ought to be allowed. It was practically the only intimation to the commissioners of the

(1) Law Rep. 4 C. P. 76. (2) 6 M. & W. 17, 20.

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nature of the cause, and was essential to enable them to know to what points their questions should be directed: *Potter* v. *Rankin* (1), is distinguishable. There the commissioners knew to what matters the evidence would be directed aliunde.

CHANNELL, B. On the first point I entertain no doubt that the plaintiff should have his costs; but on the second I am of opinion that he is not entitled to relief. I think the costs of the appeal to the judge from the master's decision refusing a commission are not to be treated as "costs in the cause," unless expressly ordered to be so treated by the judge. However inveterate the old practice may have been to make the costs of interlocutory proceedings, unless specially provided for, costs in the cause, it is not applicable to the new order of things now existing with regard to appeals from a master to a judge. By the rules made Michaelmas Term, 1867, regulating the jurisdiction of the masters at chambers, it is expressly provided (2), that an appeal shall be made by summons, and that "the costs of such appeal shall be in the discretion of the judge." Now here the judge made no order as to the costs, and I think that, this being so, the plaintiff cannot have them as part of the costs in the cause. On the third point the Court will read the letters of instruction and consider their judgment. (3)

PIGOTT and CLEASBY, BB., concurred.

Rule accordingly.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorneys for defendants: *Lyne & Holman.*

(1) Law Rep. 4 C. P. 76.

(2) The rules are to be found in Law Rep. 3 Q. B. 781.

(3) It was afterwards intimated to the parties that the Court were of opinion that the costs incidental to the letters of instruction ought to be allowed.

FITZGERALD'S CASE.

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Nov. 16.

Adjournment of Court—Parliament—Corrupt Practices at Elections—Power of Commissioners to hold Meetings without Adjournment—15 & 16 *Vict. c.* 57, *s.* 4.

Commissioners appointed to inquire into corrupt practices under 15 & 16 Vict. c. 57, may hold meetings from time to time without formal adjournment:—

Semble, such meetings cannot be intermitted for more than one week without the consent of the Secretary of State.

Quære, whether, where three commissioners have a power of adjournment, an adjournment by two, in pursuance of an agreement with the third, is valid.

RULE calling upon the three commissioners appointed, under 15 & 16 Vict. c. 57, to inquire into the existence of corrupt practices at the parliamentary election for the borough of Beverley, to shew cause why a writ of habeas corpus should not issue to the gaoler of York Castle to bring up the body of Charles Edward Fitzgerald; and why, if the rule were made absolute, Fitzgerald should not be discharged from custody without being brought personally before the Court. (1)

The prisoner was imprisoned under a warrant of the three commissioners.

The first sitting of the commission was held in the Town Hall of Beverley on the 24th of August, 1869, and the commissioners continued to sit by adjournment from day to day. On the 18th of September, 1869, by the direction of the commissioners, their secretary wrote to the Secretary of State for the Home Department as follows:—

"Sir,—I am directed by the commissioners for inquiring into corrupt practices at Beverley to inform you that by the end of next week the principal business of the commission will be concluded, and they accordingly desire your permission to adjourn the inquiry from Monday, the 27th of September, to Tuesday, the 19th of October, at which latter date they hope to complete the inquiry in a few days."

To this letter an answer was received on the 23rd of September, in the following words:—

"Sir,—I am directed by Mr. Secretary Bruce to acknowledge the receipt of your letter of the 18th instant, and to inform you

(1) The rule was obtained after the prisoner had been remitted to custody by the Court of Queen's Bench: see Law Rep. 5 Q. B. 1.

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that he approves of the Commissioners of the Beverley Election Inquiry Commission adjourning from the 27th of September to the 19th of October next."

On the receipt of this letter, the commissioners agreed on the adjournment, and it was publicly announced in the Town Hall at a meeting held on Saturday, the 25th, all three commissioners being then present; and also at a meeting on the 27th, when only two of the commissioners were present.

On the 27th of September two commissioners sat as above-mentioned, and adjourned; on the 19th of October all three held a meeting at the Town Hall at Beverley; they held another meeting there on the 20th; and on the 21st they met at the Sessions House of the East Riding. At this last meeting the prisoner, having been duly summoned, attended and refused to be sworn; whereupon the commissioners, under s. 12 of the Act, adjudged him guilty of contempt of court, and committed him to the gaol of York Castle.

On moving the rule, *Sir J. B. Karslake, Q.C.*, referred to the terms of the statute 15 & 16 Vict. c. 57, ss. 4, 5, and 6 (1); to *Reg.*

(1) 15 & 16 Vict. c. 57, s. 4:—"The commissioners appointed under this Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university, or place, shall, upon their appointment, or within a reasonable time afterwards, go to such county, &c., and shall from time to time hold meetings for the purposes of such inquiry, at some convenient place within the same, or within ten miles thereof, and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, &c., or within ten miles thereof, as to them may seem expedient; and such commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in some newspaper in general circulation in such county, &c., or the neighbourhood thereof: *Provided always, that such commissioners shall not adjourn the inquiry for any period exceeding one week without the consent and approbation of one of Her Majesty's Principal Secretaries of State.*"

S. 5:—"Provided also, that it shall be lawful for the said commissioners, with such consent and approbation as aforesaid, to hold meetings of the said commissioners in the cities of London or Westminster, and to adjourn the same from time to time, as they may deem fit."

S. 6:—"Such commissioners shall, by all such lawful means as to them appear best, with a view to the discovery of the truth, inquire into the manner in which the election in relation to which such committee as aforesaid may have reported to the House of Commons, or, where the report of such committee has referred to two or more

v. *Coroner of Dover* (1); *Rex* v. *Middlesex Justices, Re Bowman* (2); *Middlesex Special Commission Case* (3); *Rex* v. *Polstead* (4); *2nd Lisburn Case* (5); and to the Commissioners of Sewers Acts (3 & 4 Wm. 4, c. 22, ss. 8, 9; 4 & 5 Vict. c. 45, s. 12).

Nov. 16. *Sir R. P. Collier, A. G., Sir J. D. Coleridge, S. G.,* and *Archibald,* shewed cause. First, no adjournment was necessary to keep the commission alive or to enable the commissioners to sit. The statute authorizes them to hold meetings "from time to time," which implies that they are not limited to a single meeting prolonged by adjournment. Moreover, their functions are such as to require meetings of various kinds, some public but some only private; it is not to be supposed that all done at these latter meetings is void if they are not held in pursuance of a public adjournment. Reason and convenience being in favour of this construction of the Act, the burden lies upon those who seek to establish the necessity of adjournment; and the argument rests, first, on the supposed analogy of a court of justice, and secondly, on an inference from the power of adjournment given in the Act. But as to the first, the analogy fails; for the functions of the commission are not judicial but only inquisitorial. Even in quasi-judicial proceedings, such as arbitrations, no formal act of adjournment is necessary, and the only instance alleged as in point is that of quarter sessions or courts of a similar character, but they have

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elections, the latest of such elections, has been conducted, and whether any corrupt practices have been committed at such election . . . and in case such commissioners find that corrupt practices have been committed at the election into which they are hereinbefore authorized to inquire, it shall be lawful for them to make the like inquiries concerning the latest previous election for the same county, &c., and upon their finding corrupt practices to have been committed at that election, it shall be lawful for them to make the like inquiries concerning the election immediately previous thereto for such county, &c., and so in like manner from election to election, as far back as they may think fit; but where upon inquiry as aforesaid concerning any election such commissioners do not find that corrupt practices have been committed thereat, they shall not inquire concerning any previous election; and such commissioners shall from time to time report to Her Majesty the evidence taken by them, and what they find concerning the premises." . . .

(1) 10 Jur. (N. S.) 1150.

(2) 5 B. & Ad. 1113.

(3) 6 C. & P. 90.

(4) 2 Str. 1263.

(5) Wolf. & Brist. 234.

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only a statutory existence of one day, unless continued by adjournment; here, however, the commissioners are to continue acting until they have made a report (s. 6).

[CHANNELL, B., referred to *Rex* v. *Whitaker*. (1)]

That case, as well as *Grindley* v. *Barker* (2), on which it proceeded, illustrates the distinction between a judicial or quasi-judicial tribunal and an administrative or quasi-administrative body. With respect to the argument founded on the statute, the powers to meet from time to time given in the first instance in general terms cannot be cut down without express words, certainly not by words which are surplusage, or which at most only confirm the existence of a power which the commissioners would without them have possessed. The only words which can be relied on are those at the end of s. 4, and there the language is peculiar, and refers not to a *meeting* but to the *inquiry*. The effect of the whole is that the commissioners may at their discretion hold either of two kinds of meetings, new meetings from time to time, and (either without or by virtue of the express words of the statute) adjourned meetings; but their power to hold meetings in general is to this extent confined, that they cannot, without the consent of the Secretary of State, omit holding meetings for more than one week. Therefore, no adjournment being necessary, but only the leave of the Secretary of State, and that leave having been obtained, the meeting of the 19th of October and the subsequent meetings were rightly held. But, secondly, assuming adjournment to be necessary, it was actually made; for after receiving the permission of the Secretary of State they resolve on, and on the 25th at a valid meeting announce, the adjournment to the 19th. Even if the meeting of the 27th was a nullity, the adjournment was nevertheless rightly made. But though for some purposes that meeting may not have been valid, it was good for the purpose of adjournment. The Act provides for some cases of incapacity; but supposing that, in some case not provided for, a sudden casualty were temporarily to incapacitate one of the commissioners, it cannot be said that the power of the commissioners would be so wholly gone that the remaining two could not even adjourn. But here the case is not even so, for the three had already agreed upon that formal

(1) 9 B. & C. 648. (2) 1 B. & P. 229.

act which the two performed. [They also referred to *Leverson* v. *The Queen*. (1)]

Sir J. B. Karslake, Q.C., Sleigh, Serjt., and *Morgan Howard*, in support of the rule. First, adjournment was necessary. Though the analogy to tribunals, such as the quarter sessions, is not precise, it is sufficiently near to furnish a strong argument. But the cases nearest to the present are those which have occurred in election committees of the House, and these are to the same effect. In the *2nd Lisburn Case* (2) a committee held that its powers had ceased by reason of their having adjourned without the leave of the House for more than twenty-four hours, and in consequence of this decision it became necessary to provide further for the case of adjournment by the Act of 28 & 29 Vict. c. 8. A similar decision was come to in committee with respect to a revising barrister's court (*Shaftesbury Case*) (3), which was considered to have been not duly held because not held by adjournment. These decisions, and the care shewn in giving powers of adjournment by statute, as well in the case of committees of the House (11 & 12 Vict. c. 98, s. 73; 28 & 29 Vict. c. 8), as in the case of other committees (3 & 4 Wm. 4, c. 22, ss. 8, 9; 4 & 5 Vict. c. 45, s. 12), shew both the necessity of having the power expressly confirmed by the legislature and the necessity for its due exercise. But, further, the words of the present statute shew adjournment to be necessary. Here, as in the other statutes referred to, power to adjourn is expressly given; it is given twice (in s. 4 and s. 5), and no valid distinction can be drawn between the adjournment of a meeting spoken of in the middle of s. 4 and the adjournment of the inquiry spoken of at the end. In each case adjournment must have its usual technical meaning; in order to adjourn, there must be an act of adjournment, and that act must be done at a valid and duly constituted meeting. But if a power is given to three it must be executed by the three, even though they may not be agreed in opinion. Therefore, what was done on the 27th was insufficiently done, only two being present. Neither can the previous announcement on the 25th support the adjournment, for the commissioners must act together up to the very last period of time, as in the case of arbitrators making an

(1) Law Rep. 4 Q. B. 394. (2) Wolf. & Brist. 234.
(3) Falc. & Fitz. 363, 374.

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award, and the one cannot depute his functions to the others, nor can the three anticipate the proper time for doing their joint act: *D'Arcy* v. *Tamar Ry. Co.* (1)

[CLEASBY, B., referred to 4 Inst. c. 28.]

Moreover, the terms of the adjournment of the 25th were not complied with, for no meeting was held on the 27th. Neither did the commissioners do what the Secretary of State had given them leave to do, for his permission was to adjourn from the 27th to the 19th, but not to adjourn from the 25th, which was in effect what they did; and this argument equally applies whether "adjourn" is taken in its strict, or in a looser and more popular, sense. The inquiry was therefore postponed for a period of more than seven days without leave, and the powers of the commissioners had expired.

Sir R. P. Collier, A. G., in reply, upon the *2nd Lisburn Case.* (2) That decision turned upon an Act (11 & 12 Vict. c. 98, s. 73), which strictly limited the power of adjournment, except with the consent of the House, and the consent of the House had not been obtained.

KELLY, C.B. The question here raised is one of great and general importance, not only because it affects the liberty of the subject, but because our decision must govern the future proceedings of commissioners under similar commissions. We therefore thought it right to grant this rule, and to hear it argued without suggesting what the inclination of our opinion was; but having now heard those arguments I am of opinion, without any doubt, that we are bound to discharge the rule. The facts of the case are simple. [After stating the facts, his Lordship continued]:— It is insisted that, because two only out of the three commissioners were present on the 27th, there was no valid meeting, and therefore no valid adjournment, for that two could not do an act which the three were commissioned to do. As the question does not necessarily arise, I forbear from pronouncing any judgment upon the point; not because I entertain any doubt upon it, but because in a case of such extreme importance no judicial opinion should be pronounced on a point not clearly settled by authority, nor essential to the decision of the case. Assuming, therefore, that the

(1) Law Rep. 2 Ex. 158. (2) Wolf. & Brist. 234.

two, at the meeting of September the 27th, could not exercise the authority of the three, and that any act then done and all the proceedings of the meeting, including the adjournment from that day to the 19th of October, were invalid; assuming, therefore, what was then done never to have taken place, and that the day is to be treated as a blank, the question is whether, within the terms of the Act of Parliament, any express adjournment was, under the circumstances, necessary. It has been contended that the proceedings under this commission are in the nature of or strictly analogous to judicial proceedings, and the commissioners to be deemed a court, and that therefore at any meeting in the exercise of their functions an adjournment from time to time is necessary to the continuance of their authority, as in the case of magistrates assembled at quarter sessions. In support of this contention several authorities were cited which related to courts, and as to which I will only say that they have no application, because the commissioners are not a court, and therefore the analogy does not exist. This is merely a commission to certain persons to institute an inquiry, and incidentally to the function they exercise, they have, in one single instance, the powers of a court of justice; if in the course of their inquiry a contempt is committed, the commissioners have power to punish the person offending in the same way as the Courts of Westminster Hall; but this power is given only incidentally to the inquiry, is a single instance, and cannot suffice to create a general analogy to courts of justice. My Brother Cleasby has referred to the Fourth Institute, c. 28; but the commissioners there spoken of are commissioners to exercise judicial functions and carry out judicial proceedings. Here, however, we need not accept either the analogy to those commissioners, or the inference as to their powers, because the commission in question is constituted by, and its powers and functions defined in, the language of an Act of Parliament.

I therefore proceed at once to the consideration of the Act, and to the question whether the commissioners must be held to have exhausted their power by a single meeting, or whether they were empowered to hold several successive, distinct, and independent meetings, not by adjournment, but from time to time, each meeting being separate and independent. First, we find in s. 6 a general

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power to the commissioners to inquire "by all such lawful means as to them appear best" into the conduct of the election in question, which, if not elsewhere qualified, would enable them in any way they think fit to hold meeting after meeting, and to proceed with or without adjournment, at their pleasure. There must, therefore, if the prisoner is right, be elsewhere in the Act something confining their power.

In s. 4 it is provided that the commissioners shall give notice of their appointment, and of the time and place of holding their first meeting; and it is insisted that this meeting is to be the only meeting they are to hold, except adjourned meetings, which are to operate as a continuance of the first. The very expression "first meeting" seems to point to a plurality of meetings; but without insisting on that, we have a still stronger evidence of intention in an earlier part of the section, where it is provided that the commissioners shall "from time to time" hold meetings. So far no question could arise; and not only is this the natural meaning of the words, but it gives them such a construction as is reasonable, just, and convenient for carrying into effect the Act of Parliament. Why should it be necessary that any adjournment should take place, or any notice be given with respect to matters which the public do not require to know, as, for instance, when the commissioners have only to meet to consider the evidence and agree upon their report? Or, again, why should an adjournment be required where the commissioners desire to postpone the inquiry, in order to see whether they shall proceed to inquire into corrupt practices at a previous election, and where it is uncertain whether it will or will not be necessary to hold any further public meetings of inquiry and examination? That construction, therefore, is reasonably required which would allow of separate and independent meetings.

What then, in the next place, are the words relating to adjournment? They "shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, division of a county, city, borough, university, or place, or within ten miles thereof, as to them may seem expedient" (s. 4). Now, is there any reason why these words should be construed as imperative? They are not, that the commissioners *shall* adjourn,

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but that they shall have *power* to do so. The natural meaning is, that they are not bound to adjourn on each occasion to some other time or place, but that, if it is expedient, they may do so. And many cases may be imagined making such a course expedient; as, for instance, where it was desired to visit the scene of a described act of bribery, or to examine a witness who is too ill to attend, or to continue the inquiry at the room of any one of the commissioners who might not be able to quit his hotel. On the other hand, there is nothing in the nature of the inquiry making it expedient to construe the Act as imperative. It is, indeed, said that persons cannot know when they are to attend, unless the meeting is openly and publicly announced in this way. But the answer is, that as to the general public, such a formal act of adjournment would only inform those present; and as to witnesses and other persons required to attend, they would know by the terms of their summons when they were to give their attendance. The commissioners may give notice in any way they think expedient, as in this case they in fact announced the future meeting in the town hall. And not only does this view agree with practical convenience, but it is easy to see the mischief that would be produced by the opposite construction. If, for any reason, the meeting appointed cannot be held, the powers of the commissioners are at an end. This argument, it is said however, was applicable, and was used and overruled in the case of quarter sessions; but when we remember that the present commission is composed of only three members, it is obvious that the mischief is more likely to arise, and, without clear and express necessity for so doing, we ought not to suppose that the Act has put such obstacles in the way of the exercise of their functions.

Let me now consider the words at the end of the 4th section, which have been much relied on: "Provided always, that such commissioners shall not adjourn the inquiry for any period exceeding one week, without the consent and approbation of one of Her Majesty's principal Secretaries of State." The whole question here turns on the meaning of the word "adjourn." If it means, that without the consent of the Secretary of State no meeting can be held at a distance of more than one week from the preceding meeting, and that that meeting must have been formally adjourned,

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it no doubt implies a meeting to have been held, at which the adjournment could and did take place, for there can be no adjournment unless there was a meeting to adjourn. But the question is, whether any such adjournment is required, and whether more is meant than that the commissioners shall not adjourn or protract the inquiry by holding meetings at a longer interval than one week, without consulting the Secretary of State. If so, they have only to apply to the Secretary of State, whose sanction being given, not to an adjournment of the *meeting*, but to an adjournment of the *inquiry*, gives them power not (in a technical sense) to adjourn, but rather to postpone the inquiry to the day named. It is absurd to suppose, that for this purpose it is necessary to go through a form of adjournment.

Taking, then, into consideration the general powers of the commissioners, and the particular words of s. 4, it was competent to hold meetings from time to time without adjournment, the express power of adjournment being neither more nor less than a power to postpone the inquiry to a greater distance of time than one week, provided they got the sanction of a Secretary of State. What they have done is, therefore, perfectly regular, and the meeting at which the prisoner was committed duly and validly held.

CHANNELL, B. When this rule was moved for I thought that the question was one deserving consideration; but having carefully attended to the arguments, I am now clearly of opinion that the rule ought to be discharged. The commissioners are acting under, and their authority is wholly derived from, the statute of 15 & 16 Vict. c. 57; and if they were not exercising this statutory authority when they committed the prisoner for contempt, the latter is entitled to his discharge. But, though bound in the exercise of their authority to keep themselves within the statutory limits, it is another question whether the commissioners are bound to adjourn as a court of law would do; and although it is true that they may exercise some of the same powers as a court of law, this does not, in my judgment, necessarily constitute them a court for the purpose contended for. The case may be looked at in the light of the decision in *Rex* v. *Whitaker* (1); and reading s. 4 in that light,

(1) 9 B. & C. 648.

I should have said that if the section had stopped at the words "within ten miles thereof," the case would be free from all doubt; for the commissioners have express power to hold meetings "from time to time." But in the middle of the section it is said, that they "shall have power to adjourn such meetings from time to time;" and a question deserving of consideration arises upon this, as to whether the statute means here a technical adjournment, or a mere postponement? Now, the statute provides for an adjournment or postponement with reference to time, and also with reference to place. The commissioners may go to the place assigned and hold a meeting, and may of their own authority adjourn from place to place within the limits assigned; for this they want no authority from the Secretary of State. But they cannot postpone the inquiry, so that more than six days shall intervene before its resumption, without the sanction of the Secretary of State.

Two passages in the Act relate to adjournment: first, the concluding words of s. 4; and, secondly, the whole of s. 5. With respect to the latter, its words are enlarging: "It shall be *lawful* for the said commissioners, with such consent and approbation as aforesaid," to hold meetings in London or Westminster, and to adjourn the same from time to time. Now, with respect to these words, and to the power to adjourn given by the 4th section, the argument has not satisfied me, indeed my opinion is clearly otherwise, that the power to adjourn or postpone thus expressly given is intended in any way to contract the power which the commissioners would otherwise have to adjourn with respect to time. It has reference to a removal to another place, and this power, which in the 4th section is limited to a radius of ten miles, is by s. 5 extended subject to the sanction of the Secretary of State. It is said, indeed, that in the Court of Queen's Bench these words were treated as surplusage; but I do not think the language of the Lord Chief Justice was intended to mean more than that they were not restrictive. The power may be eminently useful, and cases are easy to suppose which would, I think, shew them to be of great value.

I now come to the concluding words of the 4th section; and they amount to this: "Go to the appointed place and hold meet-

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ings, but do not either leave an interval of more than six days between the meetings, or give a prolonged character to one meeting by adjournment, so as to carry it over an interval of more than six days. If it is necessary for any purpose to discontinue for such a time the prosecution of the inquiry, communicate with the Secretary of State."

It has been argued that even if an adjournment is necessary, all has been done that is required; that when application was made by the consent of all three commissioners to the Secretary of State, and his answer assenting to the proposed adjournment was received, what afterwards occurred on the 27th, in pursuance of this agreement and sanction, might be treated as an adjournment by the three. On the other hand, it was strongly argued to-day, on a ground different from that on which the rule was asked for, that no authority was given by the Secretary of State to do what has been done, because his consent was only a limited consent; namely, to an adjournment from the 27th; that there was no simple specific assent to an adjournment to the 19th; and that because of the informal character of the meeting of the 27th, the consent became unavailing. I say nothing on this point; it is not necessary to do so. If I am right on the previous point, and I now think no reasonable doubt can be entertained upon it, there was no necessity for a formal adjournment to keep alive the powers of the commissioners, and, consequently, it was not necessary that there should be a formal adjournment strictly following the terms of the Secretary of State's consent. It may be, though it does not seem to me necessary for us to decide it, that the commissioners would have lost their powers if, without the consent of the Secretary of State, they had discontinued for more than a week to prosecute the inquiry. They have, however, obtained the consent of the Secretary of State to the inquiry being discontinued, and, therefore, I think that they were in full possession of those powers when the prisoner was committed.

PIGOTT, B. I am of the same opinion. The question is, whether the commissioners were acting within their power when they committed this person for contempt. They are commissioners appointed by Her Majesty, in pursuance of an address of

the House of Commons, and under an Act of Parliament which confers peculiar powers, and establishes a peculiar method of procedure. We must deal with the Act in the ordinary way, that is, put on it a reasonable construction; and if the words are ambiguous we must interpret it ut res magis valeat quam pereat. I think however that there is no real ambiguity, and that the whole provisions of the Act may stand well together. The commissioners are to go to the place to which the inquiry relates, and hold meetings from time to time at some convenient place, or within ten miles thereof. So far the matter would be clear, but the statute then goes on to add further powers, being powers to adjourn meetings. Now, what is this power to adjourn, which is not given in the earlier part of the section? To adjourn has a technical, but it has also a popular sense, and it here signifies that the commissioners may remove the inquiry to some other place, as well as postpone it in point of time. A necessity for such a removal of the meeting to another place may easily arise in the course of the inquiry, as in the cases pointed out by the Chief Baron. Again, suppose a witness to be summoned, and to attend, but not to be examined; it is quite clear that if the commissioners did not use their powers of adjournment in respect of time, they must issue a fresh summons to the witness, but an adjournment would render a re-summons unnecessary. This explains the power and shews the reason and necessity for it. So far, then, there is no difficulty; the commissioners may sit from time to time, and they may also adjourn any meeting. But there is a further provision giving a limit to this power of adjournment, and enacting that they shall not adjourn for more than one week without the consent of the Secretary of State. It is upon this that the only real matter of argument arises, for the commissioners, it is said, did not adjourn according to the statute. Now, what happened was this. In the first place the commissioners agreed that on the 25th they would postpone or adjourn the meeting, and hold it on the 27th; and for this they wanted no power from the Secretary of State. But they also agreed not to sit again after the 27th till the 19th of October, and to postpone or adjourn the inquiry to that day. It is said this postponement to the 19th was abortive, because there was no meeting on the 27th, and therefore no adjournment, and this is

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what the whole argument is resolved into. But there was nothing requiring them to hold a meeting on the 27th, nor do I understand the word "adjourn" to be here used in such a sense as would require a formal act of adjournment. They agreed to postpone the inquiry, and not to sit again till the 19th; but I find nothing to bind them to meet on the 27th; all the Act requires is, that if they postpone the inquiry for more than one week they shall have the sanction of the Secretary of State; and this they had. The rule must, therefore, be discharged.

CLEASBY, B. I am of the same opinion, and I concur in almost everything that has been said by my Lord and my learned Brethren. The question is, whether the meeting at which the committal took place was a legal meeting. It is said that it was not, because in some way the commission had failed for want of adjournment. The answer made is, first, that no adjournment was necessary; and, secondly, that if it was necessary the inquiry was sufficiently adjourned. On the matter of commissions in general, we have to bear in mind that a commission of this nature does not appoint to an office by virtue of which those occupying it discharge its appropriate functions from time to time as occasion may arise. But it is a mere delegation of authority to certain persons. In the Fourth Institute, cap. 28, Lord Coke, after saying (at p. 163) that "a commission is a delegation by warrant of an Act of Parliament, or of the common law, whereby jurisdiction, power, or authority is conferred on others," goes on to lay down (at p. 165) as his seventh conclusion with respect to them, that, "If justices sit by force of the commission, and do not adjourn the commission, it is determined," and this agrees with Brooke's Abr. Title "Commissions and Commissioners," Plac. 12. That, then, is the law applicable to a commission at common law. But, here, we have a commission under an Act of Parliament which specifically defines its powers and duties. If we were satisfied that there was a regular adjournment, it would not be necessary to consider the construction of the Act; but I confess I cannot see my way to holding the adjournment on the 25th to be an adjournment by the three commissioners. The expression on that day of their intention to adjourn on the 27th did not amount to an act of adjournment

from the 27th; for they might have altered this determination before that day arrived. Nor, again, was the act of the two commissioners on the 27th such an act as to amount to adjournment; for if adjournment were necessary to keep alive the commission, it would be one of the most vital and important acts the commissioners could perform, and could not be treated as a mere formality. But when authority is given to commissioners to act, all must be present at its exercise, though all need not agree in the decision; this is laid down by Blackstone (1), who adds that to prevent delay it is a universal practice to insert a si non omnes clause.

I am therefore compelled to come to a conclusion upon the construction of the statute, and having regard to ss. 4 and 5, and to the particular circumstances of the case, I have no doubt that it was our duty both to hear and to discharge this rule. Having regard to the general powers and duties of the commissioners, and to the fact that they were not only to take evidence, but to report upon it, it was not, in my opinion, necessary to keep alive the commission by adjournment from time to time, and the commission was not defunct because not so continued. I read s. 4 as giving authority to meet from time to time; and I have no doubt that if no words had conferred the power of adjournment expressly, they would have had power so to meet and to adjourn; but to avoid all question, the statute gives it expressly. The effect of adjournment is that all proceedings are continued as one meeting, and whatever is done remains in force during the whole time of the adjourned meeting. Then as to the words which occur at the end of the section referring to an adjournment of the "inquiry," they only provide that without the authority and consent of the Secretary of State there cannot be an interval of more than one week in the course and progress of the inquiry. That is the reasonable construction of the Act.

But a third question arises which was not very fully argued in the Queen's Bench, whether, supposing no adjournment to be necessary, yet if an interval of more than one week elapsed after any meeting without the consent of the Secretary of State, the authority of the commissioners would not be gone. It may be that if simply that took place their authority would be gone. If, again,

(1) Bl. Com. vol. iii. p. 59 *.

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they had separated on the 25th, and before seven days expired obtained the authority of the Secretary of State to meet again after the lapse of that time, the question might then have been raised whether that would make a subsequent meeting held after that time legal, no adjournment being necessary. But the case here is not even open to that difficulty; for the Secretary of State had been previously applied to for his consent, and had given it. It is said however that the consent so given was not followed, and that therefore when they afterwards met their authority had expired. This argument was pressed strongly upon us, but I think we are not driven to that conclusion. The meeting on the 19th of October was, in fact and substance, with the consent and approval of the Secretary of State. Bearing in mind then that no adjournment was necessary, so that the meeting was not void on that ground, the interval of more than seven days also did not make it unlawful, because the Secretary of State had given his permission to the postponement.

Rule discharged.

Attorney for prisoner: *F. W. Blake, for A. W. Bainton, Beverley.*

Attorney for commissioners: *The Solicitor to the Treasury.*

END OF MICHAELMAS TERM, 1869.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXIII VICTORIA.

WRIGHT *v.* HITCHCOCK AND ANOTHER.

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Jan. 11.

Patent—Infringement by Buying and Selling—Construction of Patent—Combination of New with Old Process.

A patent was taken out by W. for "Improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein." The specification described a process of plaiting fabrics by means of a reciprocating knife in combination with a sewing machine. The first claim was for the general construction, arrangement and combination of machinery for producing plaited frills or trimmings *in a sewing machine;* the second was for the application and use of a reciprocating knife for crimping fabrics *in a sewing machine;* and the third, for the peculiar manufacture of crimped or plaited frills or trimmings "as hereinbefore described" and illustrated by a drawing.

A patent was afterwards taken out by O. for "Improvements in doubling, folding or plaiting woven or other web fabrics, and in the machinery or apparatus employed therein or connected therewith." In this O. imitated with slight variations W.'s reciprocating knife, but did not combine its use with a sewing machine:—

Held, first, that W.'s patent was not for the manufactured product, but for the process of manufacturing it.

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Secondly, that W.'s patent was not limited to the manufacture of plaited fabrics by the knife *in combination* with a sewing machine.

Thirdly, that O.'s process was therefore an infringement.

The defendants bought and sold, in the way of trade, articles manufactured by O.'s process under the description of "Orr's patent machine-made plaiting," but they were not aware that Orr's process was an infringement, nor of the existence of W.'s patent:—

Held, that they were guilty of an infringement of W.'s patent.

ACTION for infringement of a patent granted in 1862 to James Willcox on a communication from abroad by Chauncey Orrin Crosbey, of Connecticut, U.S., and assigned by Willcox and Crosbey to the plaintiff.

The defendants pleaded not guilty, and also denied the novelty of the patent, and that the invention was one for which letters patent could be granted.

By his particulars of breaches, the plaintiff complained of "the vending and selling crimped or plaited frills or trimmings made and produced by the use of a reciprocating knife applied and used in the manner described in the specification mentioned in the declaration and claimed in the 2nd and 3rd clauses thereof."

The plaintiff's letters patent were granted for the invention of "Improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein."

The final specification described the invention as follows: "The invention relates to a peculiar manufacture of frills, ruffles, or *trimmings* [this word did not occur in the provisional specification], and to a peculiar combination of mechanism to be applied to a sewing machine for producing the same. The essential peculiarity of these frills, ruffles, or trimmings, is, that the folds or plaits are crimped in one direction and transversely to the cloth in a perfectly even and regular manner, and secured by stitches in lieu of the fabric being puckered or gathered in the ordinary manner. The folds or plaits may be either secured by means of a single row of stitches, or by two or more parallel rows of stitches, that portion of the frill comprised between any two rows of stitches consisting of a series of parallel and regular folds or plaits, which may in some cases be used as an ornamental band to the frilling or full portion which is comprised between the hem or selvage of the fabric and the outer row of stitches. These ornamental frills may be made either

double or single, that is, with one or both edges left full. Another peculiarity of this improved frill, is that its hem or hems or selvages on one or both edges of the fabric are crimped simultaneously with the intermediate portion. Fabrics may be crimped so as to produce the above-described frills either singly, that is, with the folds or plaits secured on to the same piece of fabric from which they were formed, or two fabrics may be used, one of which forms a plain band on to which the other fabric is crimped and secured by stitches simultaneously.

"The peculiar combination of machinery or apparatus which I propose to adapt to an ordinary sewing machine, for the purpose of producing the hereinbefore described frills, consists of a reciprocating knife, having a straight or serrated edge, and provided with suitable notches on its edge for the passage of the needle or needles."

This knife, pressing upon the fabric laid on a smooth surface and moving forward, raised it in a fold, and carried it on under a presser with a bevelled edge, which turned down and flattened the fold over the edge of the knife. The feed motion then carried on the fabric under the presser so far as to allow of a new fold being made at the required distance behind the first, the knife moving simultaneously in the same direction; and the knife then returned to its original position for a fresh stroke. The description of this process also included the action of the sewing machine, which fixed the fold as it was made by stitches, and several parts of the folding apparatus were described as provided with holes to admit of the passage of the needles. This was also the case with respect to the more detailed description and drawings of the process in the final specification, which exhibited the process exclusively in combination with a sewing machine.

The claims were:—"1. The general construction, arrangement, and combination of machinery, apparatus, or means for producing crimped or plaited frills or trimmings in a sewing machine, as hereinbefore described. 2. The application and use of a reciprocating knife for crimping fabrics in a sewing machine, substantially as hereinbefore described. 3. The peculiar manufacture of crimped or plaited frills or trimmings as hereinbefore described and illustrated by fig. 8 of the drawings." Fig. 8 shewed a fabric

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with an open frill at each edge, the intermediate part being plaited in flat folds.

The defendants bought and sold, in the way of trade, trimmings for ladies' skirts, consisting of a flat plait similar to the intermediate part of the article shown in fig. 8, without the frills, and described as "Orr's patent machine-made plaiting." This trimming was made in Glasgow, according to a patent taken out by James Orr in 1867. The patent was granted for the invention of "Improvements in doubling, folding, or plaiting woven or other web fabrics, and in the machinery or apparatus employed therein or connected therewith." The specification described a process substantially the same to that of Willcox's patent, except that it allowed of the fabric passing over a "*roller* straight plate or table surface," and that it did not combine the action of the reciprocating knife with a sewing machine.

It was proved at the trial that plaited fabrics, similar to the trimmings sold by the defendants, had, as early as 1849, been manufactured in lengths and used as parts of other articles, such as shirts; being first plaited by hand with a knife, and then sewn, originally by hand, and later by a sewing machine; but it was also proved that no such process for plaiting as the plaintiff's was known before his patent in 1862, and that no trimmings of the kind now sold had been sold in a separate form at any earlier period.

The cause was tried before Kelly, C.B., at the sittings for London, after Trinity Term, 1869, and, the learned judge ruling that the buying and selling by the defendants was an infringement, if the manufacture by Orr's process was so, the jury found a verdict for the plaintiff on the issues of novelty and of infringement, leave being reserved to the defendants to move to enter a verdict for them.

A rule was accordingly obtained on the following grounds: 1. That there was no evidence of infringement. 2. That the patent was bad owing to the complete specification including and claiming trimmings, and the manufacture of trimmings, other than frills and ruffles. 3. That the third claim is not the subject-matter of letters patent. 4. That if the intermediate portion of the fabric is claimed apart from the frill or ruffle, then the claim

includes what was old : or for a new trial on the ground that the verdict was against evidence, and for misdirection, in merely leaving it to the jury whether the making by means of Orr's machine of the article sold by the defendants was an infringement of the plaintiff's patent.

Grove, Q.C., shewed cause. First, there was evidence of infringement. It is not necessary to contend that the act of buying alone would be an infringement, though probably that may be maintained; it is enough that the act of the defendants in buying and selling, in the way of trade, articles produced by an infringement of the patent, was itself such. That it was so is established by *Gibson* v. *Brand* (1), where Tindal, C.J., says, "If they (the defendants) have themselves sold any article of exactly the same fabric, made in the same manner as that for which the patent was taken out, such sale may be considered as a using of the invention." *Walton* v. *Lavater* (2), shews that the defendant's knowledge that the article is an infringement is immaterial; Erle, C.J., observing (3), "I should say if this were simply the case of an importation without any proof of knowledge on the part of the importer that the article imported was a patented article, the mere sale would be sufficient to charge him," although, he adds, "it is unnecessary to lay that down here." The same is established by *Betts* v. *Neilson* (4), and by the recent case of *Elmslie* v. *Boursier* (5), before Vice-Chancellor James.

[MARTIN, B., referred to Hindmarch on Patents, p. 491 (6).]

But even if knowledge on the part of the seller were necessary, it is sufficiently proved here by the fact that the defendants in selling the articles described them as "Orr's patent machine-made

(1) 1 Webster, Pat. Ca. at p. 630.

(2) 8 C. B. (N. S.) 162; 29 L. J. (C.P.) 275.

(3) 8 C. B. (N. S.) at p. 186; 29 L. J. (C.P.) at p. 279.

(4) 34 L. J. (Ch.) 537.

(5) Law Rep. 9 Eq. 217.

(6) "Proof of a sale by the defendant of an article which has been made according to the invention, is alone sufficient to entitle the plaintiff to a verdict upon this breach. For a sale must necessarily be injurious to a patentee to some extent, because it is chiefly by the profits arising from the sale of articles made in pursuance of his invention that a patentee can obtain the reward which the law intends him to receive as a consideration for the benefit which he has conferred upon the community by a publication of his invention."

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plaiting," Orr's process being, in fact, an infringement. That Orr's machinery was an infringement is clear. He has taken the substance of the plaintiff's invention, that is, the use of a reciprocating knife for plaiting or crimping fabrics. That this is not the less an infringement because he does not use it in combination with a sewing machine, which is no part of the plaintiff's invention, or because he introduces some slight variations, is shown by *Lister* v. *Leather* (1), and *Sellers* v. *Dickenson.* (2)

[MARTIN, B., referred to Hindmarch on Patents, p. 489; and the case of *Jones* v. *Pearce.* (3)]

With respect to the second point, the use of the word trimmings in the third claim does not vitiate the patent. A variance between the provisional and the complete specification does not vitiate the patent, unless it is substantial and such as to mislead. It was laid down by Pollock, C.B., in *Newall* v. *Elliott* (4), that the office of the provisional specification is not to disclose the entirety of the invention, but only to shew that the invention fully specified is the same in substance as that presented to the Attorney General in the provisional specification; and a similar view was taken by Willes, J., in *Thomas* v. *Welch* (5), and by the Court of Common Pleas in *Newall* v. *Elliott.* (6) But it is not necessary to rely upon this doctrine, for it is clear that what is claimed is the production of a crimped or plaited fabric by the process shown in the specification, and whether the product is called a frill or ruffle, or a trimming, is immaterial; in substance, the thing, however described, is the same; and it is not the product so described that is claimed, but the process by which it is produced. The plaintiff complains that Orr has copied this process, not that he has by independent means, as in *Curtis* v. *Platt* (7), arrived at the same result. The same answer may be made to the third point; it is not the product described in fig. 8 that is patented, but the process by which it is produced. The fourth point involves the same fallacy; the flat intermediate plaiting described in fig. 8 is no doubt old; so

(1) 8 E. & B. 1004; 27 L. J. (Q.B.) 295.
(2) 5 Ex. 312; 20 L. J. (Ex.) 417.
(3) 1 Webster, Pat. Ca. 122.
(4) 13 W. R. at p. 15.
(5) Law Rep. 1 C. P. at p. 202.
(6) 4 C. B. (N. S.) 269; 27 L. J. (C. P.) 337.
(7) 11 L. T. (N. S.) 245.

also is the open frill upon each side; neither the flat plaited part nor the frill is patented, nor the two together, but the process by which both or either may be manufactured according to the plaintiff's invention.

Webster, Q.C., and *Aston*, on the same side, were not called upon.

Manisty, Q.C., and *Macrory*, in support of the rule. The first question is, what is the invention specified in the plaintiff's patent? Now, here the plaintiff is in a dilemma. If he claims the product generally, whether frills, ruffles, or trimmings, he claims too much, for these are old. If he claims the plaiting of the fabric by a knife, this is also old. If he claims the sewing of the fabric so plaited in order to secure it in its place, this lastly is old. If therefore his patent is to stand, he must claim in it something which shall be different from these; and this (subject to a further observation on his use of the word *trimmings*) he does by claiming for the combination or simultaneous performance of the two operations of plaiting and sewing. But this combination has not been used by Orr, therefore there is no infringement. That this is his meaning, in all except the 3rd claim, is plain from his limiting his claim to a production of the result "in a sewing machine;" and from the fact that throughout the specification he describes the process as being carried on exclusively in a sewing machine. But if this is so there has been no infringement, for in Orr's process the two operations are separated, just as they were before the plaintiff's invention. With respect to the third claim, it is on the true construction of it too wide, and vitiates the patent, for it is a claim to the product exhibited in fig. 8, which is merely a peculiar form of a well known article, and therefore no subject matter of a patent, but only capable of protection, if at all, by registering it as a design. Even, however, if the words "as hereinbefore described" were taken to limit the generality of the claim, it would leave him open to the first objection, for the previous description is the description of the combined process. If there is any one of the claims which could be construed to claim the use of the knife separately from the sewing machine, it is the first; but the particulars of breaches restrict him to proof of infringement under the second and third claims. Secondly, there has been no infringement, even if the plaintiff's view of his patent were correct. For

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the doctrine of *Lister* v. *Leather* (1), which was explained in a limited sense by Vice-Chancellor James in *Parkes* v. *Stevens* (2), can apply only to the case where the part of the invention taken might by itself have been the subject matter of a patent. Now, the process of plaiting by means of a knife could not by itself have been patented; the patent has not, therefore, been infringed. Thirdly, if the patent has been infringed, it has not been infringed by the defendants, who have only bought and sold an article which existed and was well known before the plaintiff's patent. In all the cases cited to shew that mere buying and selling is an infringement, the defendants had actively concurred in some way in the manufacture; and against the plaintiff's contention there is the authority of Curtis on Patents, 3rd ed. p. 295, and the case of *Boyd* v. *Brown* there cited.

[MARTIN, B. The author there seems to have had principally in his mind the case of flour, which is the illustration he deals with, and in such a case it might be impossible to tell by what process the result had been produced.]

That is equally true in the present case, where the defendants have only dealt in an old, well known article. The opinion of Maule, J., in *Holmes* v. *London and North Western Ry. Co.* (3) is to the same effect, and the words of the statute, which only mention "working and making" (21 Jac. 1, c. 3, s. 5), give no support to the doctrine that an exclusive privilege of selling is conferred on the patentee.

KELLY, C.B. The first point made in this case is that the

(1) 8 E. & B. 1004; 27 L. J. (Q.B.) 295.

(2) Law Rep. 8 Eq. 358.

(3) 1 Macrory, Pat. Ca. at p. 22, Maule, J.: "You must restrain the sense of the words 'make, use, exercise, and vend,' in the patent to such a user as amounts to an infringement of the prohibition as to the working and making." However, at p. 23, Maule, J., says: "Supposing that you could show . . . that that which these defendants have done with this turntable has a tendency to diminish the number of turntables that the plaintiff would otherwise have made; then, although these defendants may not have made it at all, yet they will have infringed the plaintiff's exclusive right to work it, because you may say it is not immediately, and as such, that the working and making of the defendants is applicable; it is only because it impedes or diminishes the plaintiff's working and making," and Jervis, C. J., says: "If a man buys and sells, he may be said to be making by the hands of another person."

patent in question is for a particular product, the result of manufacture, and not for the manufacturing process. But when the patent is looked at, it is manifest that it is confined throughout to the machinery newly invented by the patentee by which the article in question is in part manufactured; I say in part, because the article is evidently not complete without the use of the sewing machine, and the way of so completing it is pointed out in the specification. A point has been raised upon this by Mr. Manisty, which I shall afterwards notice. Let us look then, first, at the language of the patent to see whether it is a patent for the product or for the machinery by which it is to be manufactured. The title of the patent describes it as being for the invention of "Improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein." It is not for an improvement in frills or ruffles, still less for an improved frill or ruffle, but for an improvement in the manufacture of frills or ruffles and the machinery employed therein. The specification also relates entirely to the machinery, and contains from beginning to end nothing which could lead us to construe it as a specification of the articles manufactured. [His Lordship then examined the first and second claims, and proceeded]:—The third claim is in these words, "the peculiar manufacture of crimped or plaited frills or trimmings as hereinbefore described and illustrated by fig. 8;" and, looking at the drawing, we find a double frill, or a middle plaited strip with a frill above and a frill below. But is it the kind of frill that is made the subject of the claim? On the contrary, it is the peculiar mode of manufacturing it, or the frill as manufactured by a reciprocating knife. Therefore, whether we look at the title of the patent, the specification, or the claim, the patent is not for the article manufactured, but for the mode by which the article described is brought into existence.

A second point, which, as it was strenuously contended for at the trial, I reserved, was that the manufacture described includes the use of the sewing machine, or that it is a manufacture by means not only of the reciprocating knife, but of a sewing machine, without which unquestionably the complete article cannot be produced in the manner described. But, looking at the whole specification and claim, this is only pointed out as the best mode of

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completing the manufacture. The sewing machine is treated as a known invention already in use, and it is separate and distinct from the mode of crimping or plaiting to which the plaintiff lays claim—that is, the mode by which he lays the fabric in folds by the agency of the reciprocating knife. This point, therefore, also fails.

A third point made is that there is an inconsistency between the provisional and the final specification, the word "trimming" not being added in the latter. But by whatever name it is described, the thing is in substance identical; it is something attached to any part of the dress either of men or women, whether it is called the frill of a sleeve, or the ruffle of a shirt, or the trimming of a lady's dress. These are all ejusdem generis, and the description is only important for the purpose of shewing for what purpose the product may be ultimately used when it has been manufactured by means of the plaintiff's invention. He does not claim to have invented either frills or ruffles or trimmings, but a mode by which such things may be manufactured.

The last point is whether the selling by the defendants of articles manufactured by the plaintiff's process is an infringement. To determine this we must look at the words of the statute (21 Jac. 1, c. 3), which, by s. 5, excepts from its nullifying operation patents for the "sole making or working of any manner of new manufacture;" and the question is, whether the buying and selling of articles made by the patented machinery is a "working or making" within the meaning of the Act. The statute does not certainly contain the word "vend," which is found in the grants of patents, but we may have some regard to the constant usage according to which for 200 years patents have contained an express licence to use and vend; and although the use of this word by the Crown is not conclusive upon the construction of the statute, it would be strange if for so long a time every patent should have purported to confer the exclusive right and interest if the grant were unauthorized. But besides this the authorities are clear and uniform, and are confirmed by the very recent case of *Elmslie* v. *Boursier* (1), before Vice-Chancellor James. It may be that in most, if not all, of the cases, when narrowly examined, it appears

(1) Law Rep. 9 Eq. 217.

that the defendants had some part in the manufacturing as well as in the selling of the article. But if it is now necessary to decide the point, I am clearly of opinion that if a man takes out a patent by means of which an article is made at a considerably less cost than the same article was before produced at, one who buys and sells such articles—I do not say on a single occasion, for each case must be determined on its own circumstances, but when he becomes, in the way of trade, a buyer and seller of quantities of such articles—knowing them to be manufactured by a machine which is, de facto, though unknown to him, itself an infringement, such buying and selling is an infringement by him of the patent. If the law were otherwise, then when a man has patented an invention, the profit of which consists in selling articles manufactured by means of the invention, another might, by merely crossing the Channel, and manufacturing abroad, and selling in London for far less than the original price, but also at a trifle less than the price charged by the patentee, articles made by the patented process, wholly deprive the patentee of the benefit of his invention. It is therefore impossible to suppose that an exclusive right to vend is not given, and the defendants have therefore infringed the plaintiff's right, and it is immaterial whether it was or was not known to them that Orr's machine was identical with the plaintiff's. The defendants' argument therefore fails on all points, and the rule must be discharged.

MARTIN, B. I am of the same opinion. The objections urged by Mr. Manisty apply principally to the question of whether there was a good patent. In my judgment, the patent was good. It professes to be for an improvement in the manufacture of a particular kind of thing already existing and known, described as frills or ruffles. What the patent claims, therefore, is an improvement in the manufacture of frills or ruffles, and it is impossible to speak more plainly. The evidence shews that anterior to the patent these things were made by hand, or by a knife folding the material, and then sewing it so as to keep it permanently folded, and the plaintiff's object is by machinery to fold, and by means of a sewing machine to sew it so as to hold it in its place. He therefore describes the operation as taking place in a sewing machine.

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The invention is admitted to be novel, and to produce the result more cheaply and conveniently than the methods previously known; there was, therefore, a good subject-matter for a patent. That invention having been patented, then, according to the Patent Law as constantly administered, the patent protected not merely the machinery, but the articles manufactured by it, although that same article may formerly have been made by hand or by some other process. As the Lord Chief Baron says, the patent would be otherwise useless. An American work has been cited in support of the opposite view, and no doubt in the case of an article like flour (an instance there referred to), and in some similar cases, great difficulty may arise in practice from the common and ordinary character of the product. But no such difficulty arises in this case; there is an improvement which renders the article much more complete and perfect, and which is obvious to knowledge. Since, then, there was a good patent which protected not merely the machinery, but the article manufactured, the next question is whether the mode of manufacturing the goods sold by the defendants was an infringement. The patented invention consisted in the use of a knife inserted in a sewing machine, and the defendants contend that Orr might take the machinery for folding, and afterwards sew the material so folded without infringing the patent. There can be no greater fallacy. What Orr takes is this very thing the patent gives protection to, and no alteration is made in it either by addition or subtraction. In the case of *Jones* v. *Pearce* (1), and in the case of *Lister* v. *Leather* (2), in the Queen's Bench and the Exchequer Chamber, it was held that if a substantial improvement is made in any process, a person who takes any material part of that invention infringes the patent. There was, therefore, a good patent, and ample evidence to warrant the conclusion of the jury that the defendants had infringed it.

CHANNELL, B. I am of the same opinion. Two questions have been raised: first, whether the plaintiff's patent is a good patent; and secondly, whether there was an infringement; and the answers to these questions depend on different considerations. With respect to the first point, the application of the evidence shews the

(1) 1 Webster's Pat. Ca. 122. (2) 8 E. & B. 1004; 27 L. J. (Q.B.) 295.

4 Jur. N.S. 947

patent to be good. One of the objections turns on the form of the specification, the final specification going, it is said, beyond the provisional. I do not think it necessary to discuss in general the relation of the provisional and complete specifications. In the view which I take of the circumstances of the case that question does not arise, for there being no proof or suggestion of fraud, I do not think that there is any such extension of the claim in the final specification as disables the plaintiff from claiming this as a good patent. The word *trimming*, it is said, is not found in the provisional specification; but the real meaning of the word, as used in the final specification, is not a trimming simply, that is, not such a trimming as is in character distinct from a frill, but a crimped or plaited frill or trimming; not a trimming, for instance, of gold lace, but one partaking of the nature and character of being crimped or plaited. That objection, therefore, fails.

The second point was, that a plaited frill or ruffle existed before the patent, and that the patent claimed the product of the process, that is everything, however made, which shall bear the character of a frill or plaited trimming. But that is not the claim; it is not the product, per se, which is claimed, but the product as made by the patented machinery.

The third point, namely, whether that has been an infringement, is to be decided on different considerations from the question whether the patent is good; and the question is, whether there was evidence to be left to the jury on which they could find an infringement. Now it is clear that the intermediate part of the plaintiff's frill is made by the reciprocating knife, and so is the trimming manufactured by Orr and sold by the defendants. That being so, it is clear that Orr has taken part of the plaintiff's invention. It is said, however, that Orr did not produce his result in the same way as the plaintiff, for that he did not produce it by means of a sewing machine; but he attained the result, as far as he could, by means of the plaintiff's reciprocating knife, and after the fabric had been so folded, secured it by sewing. It is impossible to say that this prevents the act from being an infringement. Moreover, the third claim does not say that it shall be done in a sewing machine, but only refers to the frill as described by fig. 8, which shews what would be produced by a sewing

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machine, but only as being the best mode of producing the result. There was, therefore, ample evidence of an infringement, and the rule must be discharged.

PIGOTT, B. I am of the same opinion. Without discussing in detail the points which have been fully noticed by my Lord and my learned Brothers, I concur in their view as to the plaintiff's patent. The invention claimed is clearly the process of crimping by means of the reciprocating knife, and not crimping in the sewing machine which the plaintiff uses in combination with the knife. This is clearly expressed in all three claims; and with respect to the third claim in particular, which is said by the defendants to claim the product by whatever process manufactured, I am clearly of opinion that it must be read as a claim to the reciprocating knife as used for crimping the fabric, and to the fabric as crimped by the reciprocating knife. So, also, with respect to the word *trimming;* it is only used as an alternative word for plaited frills, or things similar in kind to plaited frills, not as meaning trimmings of whatever kind. There was, therefore, a good subject-matter of a patent, and that subject-matter is properly expressed in the specification and the claims. That being so, the fact that the plaintiff combines his invention with a sewing machine cannot entitle another person to separate the knife from the sewing machine, and to do the same thing that the plaintiff does by the same process so far as concerns the use of the knife, which is the plaintiff's invention, merely substituting in combination with the knife some other process in place of the sewing machine which the plaintiff uses. That is clearly settled by the cases.

The next question is, whether there was any evidence of infringement, the defendants having nothing to do with the manufacture of the article sold by them, but only buying and selling the article manufactured by Orr's process? That must be a question for the jury upon the circumstances. The defendants were, in fact, taking the benefit of this illegal use of the plaintiff's invention. I do not say that a person would infringe a patent who only bought for his own use small quantities of the manufactured article, not knowing where they came from. It is not necessary, for the

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decision of this case, to lay down any abstract rule; the question is, whether under the circumstances the case could have been withdrawn from the jury. Now the defendants were buying and selling in the way of trade articles under the title of "Orr's patent machine-made plaiting," and Orr's process was an infringement of the plaintiff's patent. There was, therefore, clearly evidence on which the jury might find an infringement by the defendants.

Rule discharged.

Attorney for plaintiff: *J. H. Johnson.*
Attorney for defendants: *J. N. Mason.*

HEUGH AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Jan. 12.

Carrier—Refusal of Goods at Consignee's Address—Involuntary Bailee—Negligence—Misdelivery.

Carriers, after a refusal of the goods at the consignee's address, are involuntary bailees, and are only bound to act with reasonable care and caution with respect to the goods.

The plaintiffs, acting upon a supposed order, forwarded goods by the defendants' line to the address of a company from which the order purported to come, but which had, in fact, ceased to carry on business. The defendants tendered the goods at the company's late place of business, and the goods were refused. The defendants took back the goods to the station, and posted an advice note to the company, requesting instructions for their delivery. A few days afterwards N., the person who had written and sent the order in the company's name, brought to the station the advice note and a delivery order purporting to be signed by himself for the company, and obtained delivery of the goods. Afterwards, another bale of goods, similarly consigned by the plaintiffs in pursuance of the same order, was obtained by N. from the defendants under similar circumstances, except that no advice note had in this case been sent:—

Held, that it was a question for the jury, whether the defendants had acted with reasonable care and caution with respect to the goods after their refusal at the consignees' address; and the jury having found for the defendants, the Court refused to disturb the verdict.

THIS was an action brought by the consignors of goods by the defendants' line to recover damages from the defendants for delivering the goods to a person who obtained the delivery by

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fraud, after the goods had been forwarded to the consignees' address and there refused. (1)

The cause was tried before Kelly, C.B., at the sittings for London after Trinity Term, 1869. It appeared that the Southwark India Rubber Company had formerly had dealings with the London house of the plaintiffs, but had ceased to carry on business in August, 1866, and their premises were left in charge of a Mr. and Mrs. Tyler.

On the 30th of July, 1867, an order for goods was received by

(1) The declaration contained seven counts. The first count alleged a contract by the defendants, as carriers, with the plaintiffs, to carry certain goods, being a bale of cotton duck, and deliver them to the Southwark India Rubber Company at their premises, Grange Road, Bermondsey; and that in case the defendants should be unable to deliver the goods at the premises of the company, they would thereupon conduct themselves reasonably with respect to the said goods; and averred that, although the defendants were unable to deliver the goods at the premises of the company, they did not thereupon conduct themselves reasonably with respect to the goods, but afterwards wrongfully, &c., delivered the same to one G. F. Nurse, who had no right, title, or authority to receive the same.

The third count charged the defendants with a misdelivery as carriers.

The fifth count alleged that the plaintiffs delivered the goods to the defendants as carriers to be carried and delivered to the Southwark India Rubber Company, at their premises, Grange Road, Bermondsey; that the defendants carried the goods, and were ready to deliver the same at the premises of the company, but through no fault or negligence of the plaintiffs were unable to do so, by reason of no person being at the said premises ready to receive the same; that thereupon it became and was the duty of the defendants to conduct themselves reasonably with respect to the said goods, but that they wrongfully, &c., and without giving the plaintiffs any notice that they were so unable, delivered the goods to G. F. Nurse.

The second, fourth, and sixth counts were the same as the first, third, and fifth, but related to another bale of cotton duck.

Seventh count, trover for the bales.

Pleas: 1. To the first and second counts, denial of the contract. 2. To the first count, denial of the breach. 3. To the second count, denial of the breach. 4. To the five last counts, not guilty. 5. To the third, fourth, fifth and sixth counts, denial that the defendants received the goods on the terms therein stated. 6. To the third count, so far as relates to the charge of not delivering to the company, that the defendants carried the goods, and were ready and willing to deliver them to the company, but the company would not receive them, whereby the defendants were prevented from delivering the same to the company, and the same were left in their hands against their will after the time when the company ought to have received the same. 7. Plea to the fourth count, the same.

Issue on all the pleas.

the plaintiffs, purporting to come from the Southwark India Rubber Company, but which had in fact been sent by G. F. Nurse, a person formerly in their employment as traveller.

In pursuance of this supposed order, the plaintiffs, on the 10th of August, despatched one bale of cotton duck by the defendants' line, consigned to the company at their old place of business. The bale arrived on the 12th of August, and was forwarded to the company's premises; but Mrs. Tyler refused to take it in.

On the 13th, Nurse wrote to the defendants a letter signed by him for the company, stating that instructions would be given for delivery of the goods.

On the 14th the defendants, in accordance with their usual practice, addressed to the company an advice note in the following form:—

"Camden Station, Aug. 14, 1867.

"Advice of goods.—Messrs. The India Rubber Company.

"The undermentioned goods, consigned to you, having arrived at this station, I will thank you to instruct our agents, Messrs. Pickford & Co., as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers, but as warehousemen, and at owner's sole risk of loss or damage by deterioration or fire, and subject to the usual warehouse charges in addition to the charges now advised. When you send for the goods, please send this note." At the foot of the note the particulars of the goods and the charges were stated.

On the 16th Nurse brought to the defendants' station the advice note, and a letter signed by him for the company, requesting the defendants to deliver the goods to the bearer. On the production of these documents the defendants delivered the goods to Nurse.

A second bale similarly consigned by the plaintiffs arrived on the 16th of August, and was similarly forwarded and refused; and on the 21st Nurse brought to the defendants' station a delivery order similar to the former one, and obtained this bale also. No advice note had been sent on this occasion by the defendants.

All the communications from Nurse both to the plaintiffs and to the defendants were written on the company's paper, headed with their printed name and address.

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The Lord Chief Baron, with the assent of the counsel for the plaintiffs, left to the jury in substance the question, whether the defendants acted reasonably, properly, and without negligence in the course they took with respect to the goods, and in ultimately delivering them to Nurse. The jury answered this question in favour of the defendants, and a verdict was entered for them, with leave to the plaintiffs to move to enter a verdict for 122*l.*, if, on the facts proved, they were entitled to have the verdict entered for them.

Prentice, Q.C., having, on the 5th of November, obtained a rule accordingly, and for a new trial, on the ground of misdirection, and that the verdict was against evidence,

Jan. 12. *Giffard, Q.C.*, and *M'Intyre*, shewed cause. The duty of the defendants as carriers was ended by their tender of the goods at the consignees' address, and their duty afterwards could not be more than that of warehousemen or depositaries: *Great Western Ry. Co.* v. *Crouch.* (1) But the obligation of a depositary of goods is not like that of the carrier to insure the right delivery of the goods, but only to use reasonable care and diligence, and it is only for neglect of that care that he can be made answerable: *Green* v. *Hollingsworth.* (2) For theft, in particular, he is never answerable unless his own gross neglect has caused it: Story on Bailments, s. 444 (3); and here it was by a theft that Nurse obtained delivery of the goods. Under such circumstances, therefore, it must be a question for the jury whether the defendant has been guilty of gross neglect: *Doorman* v. *Jenkins* (4); and this issue the jury have found in favour of the company. In two cases, under circumstances in some degree resembling the present, *Stephenson* v. *Hart* (5) and *Duff* v. *Budd* (6), the jury found a verdict adverse to the defendants, and the Court refused to interfere with it; but those cases are no warrant for the position that, as a matter of law, a violation of duty was to be inferred; rather from the fact that the question was there left to the jury, the contrary may be inferred.

(1) 3 H. & N. 183; 27 L. J. (Ex.) 345.
(2) 5 Dana. R. 173.
(3) See also *Giblin* v. *McMullen*, Law Rep. 2 P. C. 317.
(4) 2 A. & E. 256.
(5) 4 Bing. 476.
(6) 3 B. & B. 177.

10 C 4 Jur N S 457

Here, also, the question was rightly left to the jury, nor was any other question submitted at the trial on behalf of the plaintiffs. [They also contended that the verdict was not against the evidence.]

Prentice, Q.C., and *Murray*, in support of the rule. After the tender of the goods the defendants were in the position of warehousemen, and though not, like carriers, answerable for theft, they were answerable for a misdelivery: Story on Bailments, ss. 450 (1), 536—539, 543, 545, b.; and misdelivery, not theft, is the character of the transaction in question, for they were voluntary and acting parties in the delivery to Nurse; but the theft spoken of is an act done without their knowledge or privity. The distinction between an act and a mere omission is drawn in *Willard* v. *Bridge* (2), and in *Lichtenhein* v. *Boston and Providence Ry. Co.* (3)

[CHANNELL, B. It is admitted that the defendants were not carriers; but is it true that they were warehousemen? Did they not occupy an intermediate position, that of unwilling bailees?

MARTIN, B. The law on this point appears to be correctly stated in Redfield on Carriers, s. 25, which entirely agrees with what was laid down in this court and affirmed in the Exchequer Chamber in *Great Western Ry. Co.* v. *Crouch.* (4)]

In *Stephenson* v. *Hart* (5), and *Duff* v. *Budd* (6), the defendants were in the same position as in the present case, and these cases, and the expressions used in them, are strongly in favour of the present plaintiffs. But here the plaintiffs' case stands on higher ground, for the defendants had by their notice claimed warehouse rent, and were therefore not gratuitous bailees, but were within the cases of *Cairns* v. *Robins* (7) and *White* v. *Humphery.* (8)

(1) Story on Bailments, s. 450:—"Warehousemen are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants in making a delivery of the goods to a person not entitled to them. For it is part of their duty to retain the goods until they are demanded by the true owner; and if by mistake they deliver the goods to a wrong person, they will be responsible for the loss, as upon a wrongful conversion;" referring to *Willard* v. *Bridge* (4 Barb. R. 361); *Lubbock* v. *Inglis* (1 Stark. 104).

(2) 4 Barb. R. at p. 367.

(3) 11 Cush. R. 70.

(4) 3 H. & N. 183; 27 L. J. (Ex.) 345.

(5) 4 Bing. 476.

(6) 3 B. & B. 177.

(7) 8 M. & W. 258.

(8) 11 Q. B. 43.

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[KELLY, C.B. In those cases a contract existed between the parties; but how could the defendants here become entitled to rent merely because they claimed it by a note sent after the goods were in their possession, and which was not even addressed to the plaintiffs, and was never communicated to them?]

[They also contended that the verdict was against the evidence.]

KELLY, C.B. This rule must be discharged. The question is, whether, under the circumstances, the delivery to Nurse by the defendants amounted in law to a conversion, or whether the defendants were only bound to act, and did act, with reasonable care. On the arrival in London of the goods consigned by the plaintiffs to the Southwark India Rubber Company, the defendants, in strict accordance with their duty, sent the goods to the place to which they were addressed. The person in charge of the premises refused to take them in, and at that moment the question arose, What duty was imposed upon the defendants in relation to the goods? They could not deposit them on the pavement, and they were not permitted to bring them into the house; they were, therefore, under the necessity of taking them back to the station. Now it is their practice, when goods are refused at the address to which they are consigned, to deposit the goods in safety, and to send an advice note to the consignees, informing them that the goods remain at their risk and charges, and requesting them to give instructions for their delivery, and on sending for them to produce the advice note. This course was adopted by the defendants on the present occasion; the advice note was sent, and a few days after it was brought to the defendants' premises by Nurse, a person formerly employed by the India Rubber Company, and the goods were, on his demand in the name of the company, delivered to him. A second bale of goods was delivered to him under similar circumstances.

The plaintiffs contend that this was a misdelivery on the part of the defendants amounting to a conversion; but no sufficient authority has been cited in support of this position. It is true that a misdelivery by a carrier has been held to amount to a conversion; but the defendants' character of carriers had ceased, and

whatever character they filled it was not that. Their position has been not inaptly described as that of involuntary bailees; without their own default they found these goods in their hands, under circumstances in which the character of carriers under which they received them had ceased. Did they, then, as such involuntary bailees, become subject to an absolute duty to deliver to the proper person, so as to be liable for a misdelivery, though without negligence? The only authorities in the courts of this country cited in support of that proposition are *Stephenson* v. *Hart* (1) and *Duff* v. *Budd* (2); but in neither case was it held, or even contended, that the misdelivery amounted, as a matter of law, to a conversion; but in both cases it was admitted to be a question for the jury—and the question was, in fact, left to them—whether, under all the circumstances, the defendants had acted with reasonable care. It is plain, then, on the authority of those cases, that misdelivery under such circumstances is not, as a matter of law, a conversion, but that it is a question of fact for the jury, whether the defendants have exercised reasonable and proper care and caution. The jury have answered this question in favour of the defendants, and they are therefore entitled to keep their verdict. I may add that it was from the plaintiffs' act, in giving credit to Nurse, that the whole difficulty arose, and that this was a matter which the jury were entitled to take into account in considering whether the defendants had discharged the duty cast upon them with respect to the delivery of the goods.

MARTIN, B. I am of the same opinion. Two objections are made by the plaintiffs. First, that there was a misdirection by the Lord Chief Baron; second, that the verdict was against evidence. With respect to the first (assuming that it is open to counsel to contend that there is misdirection when the judge puts to the jury the very question which he is asked to leave to them), I am of opinion that there was no misdirection. A fraudulent order for goods was sent to a firm at Manchester, purporting to come from a company which had, in fact, given no authority for the order, and the goods were forwarded by the defendants' line, to be delivered accordingly. Under ordinary

(1) 4 Bing. 476. (2) 3 B. & B. 177.

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circumstances there would be no contract by the defendants with the consignors, but only with the consignees, for whom the consignors would be presumed to have acted as agents. But here, there being no such sale, the property remained in the plaintiffs, and the defendants' duty was to obey their orders. This the defendants did, or rather were ready and willing and offered to do, and they thus performed the duty that was laid upon them. But there was no one who could or would receive the goods, and the defendants were thus in the position—I know of no better term—of involuntary bailees. By reason of a mistake not made by them they found the goods on their hands. Now, as is laid down in the passage I have quoted (Redfield on Carriers, s. 25) (1), when the carrier accepts the goods he becomes an insurer; but when he has done all that he contracted to do, then his relation of carrier ceases, and a duty is, under such circumstances as the present, cast upon him of acting as a reasonable man. What, then, did the defendants do? They carry the goods back to their station, and send an advice note to the consignees. Soon after Nurse comes, bringing the advice note, and claims the goods, and obtains delivery. Upon my Lord's direction, which, even if it were without the sanction of plaintiffs' counsel, I should hold to be right, the jury have found that the course adopted by the defendants was reasonable and proper, and that verdict is approved of by my Lord who tried the cause, and is also in my own judgment right. It is impossible to suggest any substantial ground

(1) See also s. 127:—"If goods are tendered in proper time, place, and manner, to the owner or consignee, and refused, the carrier is released, as such, and is thereafter only responsible as an ordinary bailee." In s. 120, however, it is laid down that in cases where the consignee cannot be found, or *refuses to accept* the goods, the carrier "is bound to keep them, *as carrier*, until the owner or consignee, by the use of diligence, has time to remove them, when his duty as carrier ceases;" referring (amongst other cases) to *Eagle* v. *White* (6 Whart. R. 505), where, however, it is laid down that "in case of the refusal of the consignee to receive the goods, he (the carrier) is not justified in abandoning them. Although his strict accountability as carrier may cease, he becomes a bailee, and as such must take *ordinary care* of the goods;" and also to *Hemphill* v. *Chenie* (6 Watts & S. R. 62), where it is said, at p. 65, "If the consignee refuse or neglect to accept possession of them (the goods) the course of the carrier is plain: let him store them in a warehouse, with orders to deliver to the consignee on payment of freight and expenses. When he does so, his duty is discharged, and his liabilities as carrier cease, and not till then."

for imputing want of care to the defendants, who were misled by the same person who had misled the plaintiffs.

CHANNELL, B. I am of the same opinion. As to the correctness, in fact, of the verdict, I think it right; and it has the sanction of the Lord Chief Baron, who tried the cause. The only question is, whether the delivery to Nurse, under the circumstances, amounted in law to a conversion, for the plaintiffs' argument must go that length. Some American cases were cited in support of this proposition, but they fail to satisfy me that any such duty was cast upon the defendants as to produce this legal result, or that any duty was imposed upon them to do more than they have done. They acted as reasonable men, and were misled without any default of their own.

Attorneys for plaintiffs: *Hutchins & Murray.*
Attorney for defendants: *Blenkinsop.*

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Jan. 14.

Bill of Exchange—Notice of Dishonour—Time—Reasonable Diligence.

A bill of exchange drawn by the defendant on and accepted by W. and indorsed to S., and by S. indorsed to the plaintiff, was presented to W. for payment at maturity and dishonoured. All the parties to the bill lived in London. The morning after its dishonour the plaintiff, who did not know where the defendant, the drawer, lived, applied to S. for information on the point. S. was from home, but at half-past five in the afternoon the plaintiff went to him again, and having obtained the address of the defendant, posted his notice of dishonour the same evening, but not till after six o'clock. The consequence was that it was not received that night, as it would have been in the ordinary course of post if posted before six o'clock.

In an action by the plaintiff as indorsee against the drawer, the jury found that the plaintiff had exercised a reasonable amount of diligence in giving notice of dishonour:—

Held, that although it was not given in sufficient time to reach the drawer on the day after the bill had been dishonoured, it was not, under the circumstances, too late.

DECLARATION by an indorsee of a bill of exchange for 28*l.* against the drawer.

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Plea, traversing the giving of due notice of dishonour. Issue thereon.

At the trial before Kelly, C.B., at the sittings for Middlesex after last Michaelmas Term, it appeared that the bill declared on was drawn by the defendant on one Welsh at three months after date, and duly accepted, and was afterwards endorsed to one Smith, who endorsed it to the plaintiff. It became due on Friday, the 17th of September, 1869, and was presented on that day to Welsh, by the plaintiff, but was dishonoured. All the parties to the bill lived in London. On the day following its dishonour the plaintiff, with a view of giving notice to the defendant, and being ignorant of his address, applied to Smith for information. Smith was from home, but later on the same day, at about half-past five in the afternoon, the plaintiff went to him again and obtained the defendant's address. He posted his notice of dishonour the same evening, but not until after six o'clock. The consequence was that it was not received by the defendant until Monday, the 20th of September. If it had been posted before six, the defendant would in the ordinary course of the London postal delivery have received it on the Saturday evening. The jury, under the direction of the learned judge, found that the plaintiff had exercised reasonable diligence in forwarding the notice of dishonour, and thereupon a verdict was entered for the plaintiff, with leave to move to enter a verdict for the defendant.

H. T. Cole, Q.C., moved accordingly, on the ground that the notice of dishonour was too late. The plaintiff, if he had pleased, might have discovered the defendant's address from Welsh, the acceptor, on the day the bill was dishonoured.

[MARTIN, B. I do not think he was bound to make instant inquiry. It is enough if, on the day following, he used reasonable diligence in discovering where the defendant lived.]

At all events he might have posted his notice before six on the Saturday evening, in which case it would have been delivered the same night. Not having done so, he cannot be said to have exercised reasonable diligence, and therefore comes within the rule, that where all the parties to a bill live in London, notice of dishonour must be given so as to be received on the day after the

actual dishonour of the bill: *Bateman* v. *Joseph* (1); *Williams* v. *Smith* (2); Byles on Bills, 9th ed. p. 275.

KELLY, C.B. I think this rule ought to be refused. The holder of a bill is not bound, *omissis omnibus aliis negotiis* to devote himself to giving notice of its dishonour. He must, however, use due and reasonable diligence, or the notice will be too late. Now here, unless we are prepared to say as a matter of law that the plaintiff was under any absolute necessity of writing and posting his notice in the half-hour which elapsed from his discovery of the defendant's address and six o'clock, I am of opinion that there was evidence of sufficiently reasonable diligence, both in discovering the address and in posting the notice. The notice was therefore in time, and the verdict ought not to be disturbed.

MARTIN, B. I am of the same opinion. My impression is that the cases show that, in calculating the time within which notice of dishonour must be given by the holder of a bill, the point for commencement is not the day after the bill becomes due, but the day after that on which the holder, after exercising reasonable diligence, is in a position to give the notice.

CHANNELL and PIGOTT, BB., concurred.

Rule refused.

Attorney for defendant: *Harris.*

(1) 2 Camp. 461. (2) 2 B. & A. 496.

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WALLIS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Carriers—Railways Clauses Act, 1845 (8 *Vict. c.* 20), *s.* 97—*Construction—Tolls.*

2 QBD 264, 267, 7 QBD 157

The 97th section of 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to the company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages.

DECLARATION, charging the defendants as carriers with non-delivery of goods delivered to them to be carried from London to Jersey.

Plea, that before the arrival of the goods in Jersey the plaintiff had failed on demand to pay certain tolls due from him to the defendants, in respect of the carriage by them of certain other goods of the plaintiff, before then carried by the defendants for the plaintiff, and which goods had before then been removed from the defendants' premises; averring that the goods in the declaration mentioned were, within a reasonable time after their arrival at Jersey, tendered by the defendants to the plaintiff on payment of their reasonable charges for the conveyance of the same, and also of the tolls due in respect of the other goods, but that the plaintiff refused to pay the said charges and tolls, whereupon the defendants detained such goods for a lien and security for the said charges and tolls, which detention, &c.

Demurrer, and joinder.

Thrupp, in support of the demurrer. The Act of 8 Vict. c. 20, has no extra-territorial operation; therefore s. 97 (1), on which

(1) 8 Vict. c. 20, s. 92:—"It shall not be lawful for the company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods than they are by this and the special Act authorized to demand; and upon payment of the tolls from time to time demandable all companies and persons shall be entitled to use the railway with engines and carriages properly constructed," &c.

ss. 93, 94, provide for the publication on boards of a list of all the tolls authorized by the special Act to be taken, and for maintaining milestones along the line.

s. 95. No tolls shall be demanded or taken by the company for the use of the railway during any time at which the toll boards are not exhibited, or the milestones not maintained.

s. 96. The tolls are to be paid upon or near to the railway, as the company

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the defendants rely, has no application to the case of goods to be delivered beyond England; the machinery provided by s. 100 for adjusting disputes in such cases could not be resorted to; and even if the section were otherwise applicable the defendants do not bring themselves within it, for the plea shews no sale, but only a detention, without saying that it was for the purpose of sale.

C. W. Wood was called on to support the plea. Even if the statute were not applicable by its own force beyond England, yet in a contract made between Englishmen in London the parties must be taken to have contracted on the footing of the statute.

[MARTIN, B. The tolls for which the company claim to detain the goods are tolls payable to them as carriers, but s. 97 refers only to tolls due for the use of their line by persons conveying goods in their own carriages.]

That is inconsistent with the meaning given to "tolls" in the interpretation clause (s. 3).

KELLY, C.B. The defendants' claim to detain these goods is based on s. 97 of 8 Vict. c. 20. But on looking at that section it is clear that it refers, not to charges due to the company for the conveyance by them of goods as carriers, but to the case of goods

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shall, by notice to be annexed to the list of tolls, appoint.

s. 97 :—"*If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage or all or any part of such goods; or*, if the same shall have been removed from the premises of the company, *to detain and sell any other carriages or goods* within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the toll payable as aforesaid, and all charges and expenses of such detention and sale . . . . or it shall be lawful for the company to recover any such tolls by action at law."

By s. 98, every person being the owner or having the care of any carriage or goods passing or being upon the railway is, on demand, to give to the collector of tolls an account in writing of the "number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out, or are about to set out, and at what point the same are intended to be unloaded or taken off the railway."

By s. 3 (the interpretation clause), "the word *toll* shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway."

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conveyed in the carriages of the owners, who bargain only for the use of the company's line. This is clear, if s. 97 is read in connection with the immediately preceding sections, 95 and 96, which relate evidently to such tolls only. No doubt the word tolls may sometimes have a more extensive signification given to it, but it here means only tolls in the proper sense of the word; that is, tolls paid for the use of the railway. The section has, therefore, no application to the case stated on the record, and the demurrer must be allowed.

MARTIN, B. I am of the same opinion. The word "tolls" in s. 97 obviously means that which the Lord Chief Baron has stated, that is, tolls for the use of the railway by persons carrying goods in their own carriages, as, for instance, in the case of coals. It is for such tolls only, being the tolls mentioned in the previous sections, that s. 97 gives a lien to the company. But it is obvious that the tolls mentioned in the plea are not such tolls, but reasonable charges for the conveyance of goods by the defendants as carriers. The plea is therefore no answer to the declaratiou.

CHANNELL, B. I also think that the plaintiff is entitled to judgment. The defendants rely upon their statutory lien, but the Act does not apply to goods received by them as carriers.

PIGOTT, B., concurred.

Judgment for the plaintiff.

Attorney for plaintiff: *Flower.*
Attorney for defendants: *Crombie.*

McMANUS, Administratrix, *v.* BARK. 1870 *Jan.* 18.

Promissory Note—Subsequent Agreement—Variation in Mode of Payment—Consideration—Waiver.

The defendant gave to J. M. a promissory note, whereby he promised to pay J. M. or order on demand, 520*l.* with interest, at the rate of 5 per cent. per annum. Afterwards a written agreement was entered into by the defendant and J. M., that the principal sum of 520*l.* should be repaid by quarterly instalments of 25*l.* with interest.

In an action brought after the death of J. M., by his administratrix, to recover the whole amount for which the note was given:—

Held, that the subsequent agreement between the defendant and J. M. was no defence, inasmuch as it was not founded on any valuable consideration.

Declaration, by the administratrix of John McManus, on a promissory note, dated the 24th of April, 1867, whereby the defendant, the maker, promised to pay John McManus, or order on demand, the sum of 520*l.* with interest from the 24th of July, 1867, at the rate of 5 per cent. for every year the same should remain unpaid.

Pleas (among others): 2. Waiver. 3. Satisfaction and discharge by the defendant entering into an agreement with the deceased for the payment by the defendant of the sum of 520*l.* mentioned in the note, by instalments of 25*l.*, and interest quarterly. 4. That after the making of the said note, and before default, and while the deceased was the holder, it was agreed between the defendant and the deceased that the contract in the note contained should be waived or rescinded, and that in lieu of the sum of 520*l.* and interest therein mentioned, being paid or payable on demand, the same should be paid and payable and received and receivable by quarterly instalments of 25*l.* and interest at 5 per cent. on the amount remaining due quarterly, the first quarterly payment to be made on the 24th of July, 1868.

Issue.

The cause was tried before Willes, J., at the Liverpool winter assizes, 1869, when the defendant relied in support of his pleas on the following agreement:—

"Agreement between Mr. John McManus and Mr. John Bark,

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both of Bootle Lane, Liverpool. The said John Bark owing the said John McManus the sum of 520*l.* for which the said John McManus has already a promissory note, it has been mutually agreed this day that the principal shall be repaid at 25*l.* each quarter, with interest after the rate of 5*l.* per cent. per annum; the first quarter due the 24th of July, 1868.

"Liverpool, Nov. 5, 1867. John McManus."

The learned judge was of opinion that the agreement was not founded upon any valuable consideration, but was a mere voluntary indulgence, and afforded no answer to the action. He therefore directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendant.

Jan. 13. *Aspinall, Q.C.* (*R. G. Williams* with him), moved accordingly, on the ground that the agreement afforded a good defence. The agreement was a discharge of the note, and would have been valid even if by parol only, *Foster* v. *Dawber* (1); and although there were no consideration: Smith's L. C. 6th ed. vol. ii. p. 310. Moreover, there was in two ways consideration for the agreement. The deceased had thereby an investment found for his money for a fixed time, and the regular payment of interest every quarter was secured. Either of these advantages was sufficient consideration to support the agreement. *Bowerbank* v. *Monteiro* (2); *Sweeting* v. *Halse.* (3)

Cur. adv. vult.

Jan. 18. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB.) was delivered by

Kelly, C.B. In this case the question is whether the agreement, dated the 5th of November, 1867, put an end to the right which the plaintiff otherwise would have had to sue on the promissory note given to the deceased John McManus by the defendant. We are all of opinion that the agreement constitutes no bar to the present action, inasmuch as it was made for no consideration whatever. It was argued that there was a consideration

(1) 6 Ex. 839. (2) 4 Taunt. 844.
(3) 9 B. & C. 365.

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for it in one of two ways. The mode of payment of interest was varied, it was said, and a quarterly instalment secured to the deceased. But that circumstance cannot be relied on; for the note was payable with interest on demand, and at any moment the payment of the whole, with interest, could have been insisted on. Then, again, the counsel for the defendant contended that the agreement gave the deceased a secure investment for the amount of the note for a fixed time at a sufficient rate of interest. This, however, depends on whether the defendant was left at liberty to come at any time and tender the whole amount. We think he was at liberty to do so. There was no obligation upon him to remain indebted, unless he pleased. Nor, on the other hand, was the deceased under any obligation not to sue on the note after demand. There was, therefore, no consideration for the agreement relied on by the defendant, and the rule must be refused.

Rule refused.

Attorneys for defendant: *Cunliffe & Beaumont, for Woodhouse & J. Pemberton, Liverpool.*

BURROWS *v.* THE MARCH GAS AND COKE COMPANY.

Jan. 18.

Damages—Remoteness—Injury resulting from Two Independent Causes—Measure of Damages—Negligence—Breach of Contract or Duty.

The defendants, a gas company, contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside, to a meter inside, his premises. Gas escaped, from the pipe laid down under the contract, into the plaintiff's shop. The servant of a gasfitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it, with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's premises and stock. On the trial of an action against the defendants to recover for the injury sustained, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied, and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Upon these findings:—

Held, that the plaintiff was entitled to recover, and that the defendants were not relieved from responsibility by the negligent act of the gasfitter's servant.

Per Kelly, C.B., and Pigott, B. The cause of action was the negligence of the

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defendants, from the consequences of which the intermediate negligence of a person not in the plaintiff's service could not relieve them.

Per Martin, B. The defendants' liability arose from their breach of contract in not supplying the plaintiff with a proper service pipe; and even if the person whose negligence was the immediate cause of the explosion had been in the plaintiff's service, the defendants would nevertheless have been liable.

DECLARATION, that the defendants were a company making and selling gas for reward, and that it was agreed between the plaintiff and the defendants that the defendants should provide, and well and sufficiently lay, a proper and sufficient communication, and proper and sufficient service pipes, from the mains of the defendants to a certain gas meter within the premises of the plaintiff, for the purpose of furnishing the plaintiff with a supply of gas; yet the defendants did not provide and properly lay a proper and sufficient communication, and proper and sufficient service pipes, for the purpose aforesaid, but so negligently and improperly conducted themselves in and in relation to the providing and laying a communication and service pipes for the purpose aforesaid, that the pipes provided and used by the defendants for that purpose were not proper and sufficient, and the same were not well and sufficiently laid by the defendants, and by reason thereof, after gas had been laid on through the same by the defendants for the purpose of supplying the plaintiff therewith, to be used on the said premises as aforesaid, large quantities of the said gas leaked and escaped from the said communication and pipes, and caught fire and exploded and damaged the plaintiff's shop and premises.

Pleas: 1. That it was not agreed as alleged. 2. Not guilty. Issue thereon.

The cause was tried before Cockburn, C.J., at the Cambridgeshire summer assizes, 1869, when it appeared that the plaintiff is the occupier of a linendraper's shop in the town of March, and the defendants are a gas company carrying on business in the same place. In May, 1869, the plaintiff, being desirous of making some alterations in his premises and in the mode in which gas was supplied to them, ordered from the defendants a new meter, which was placed under a staircase at the back of the shop. The plaintiff, after the meter had been fixed, requested a gasfitter named Bates, who was at work on the internal gas fittings of the premises,

to tell the defendants to supply a fresh service pipe from the main to the meter. This they accordingly did on the 10th of May, and the same evening turned on the gas earlier than the usual hour, with a view of having the sufficiency of the pipe tested. They had not, however, previously communicated to Bates the fact of the gas being turned on, nor was there any one in their employment on the spot to conduct the testing operation. The pipe was, in truth, defective, having a hole in it, and the result was, that immediately after the gas was turned on, it began to escape in large quantities into the plaintiff's shop. One Sharratt, a servant of Bates, the gasfitter, happened to be at work in an upper room, and on being informed that there was an escape of gas below, went down with a lighted candle in his hand to try and discover where the fault in the apparatus was, and whether it was in the fittings supplied by his master. Immediately on his entering the shop an explosion ensued of great violence, causing the damage to the plaintiff's premises and stock for which this action was brought.

The jury found, in answer to the questions left them by the learned judge, first, "that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied;" and, secondly, "that there was negligence on the part of Sharratt in using a lighted candle." They further expressed an opinion, which, however, the learned judge considered to be ultra vires, that the defendants ought to have sent their foreman to inspect the pipe after it had been laid down. A verdict was thereupon entered for the plaintiff for 40*l.*, the amount of damage sustained, with leave to move to enter a verdict for the defendants or to reduce the damages to a nominal sum.

A rule was obtained accordingly in Michaelmas Term, 1869, on the ground that upon the evidence the verdict ought to have been entered for the defendants, or that, if not, the damages ought to be reduced to a nominal amount, on the groun l that the injuries sued for resulted from the negligence of Sharratt, and not from the defendants' breach of contract.

Jan. 15 and 18. *Keane, Q.C.*, and *Merewether*, shewed cause. The negligence of Sharratt, a servant not of the plaintiff, but of Bates,

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another tradesman, who happened to be employed at the same time with the defendants on the premises, cannot affect the defendants' liability for their negligence in supplying a defective pipe. Or, assuming the question is one of contract, they are liable to pay substantial damages, for the breach of which they were guilty. Sharratt was a stranger to both parties, and his conduct does not affect the legal rights or duties of either.

O'Malley, Q.C., and *Graham*, in support of the rule. The efficient cause of the accident was Sharratt's negligence, and he and his employer would, no doubt, be responsible. But the defendants' conduct is too remote a cause to subject them to liability: *Ward* v. *Weeks* (1); *Holden* v. *Liverpool New Gas Co.* (2); *Wilson* v. *Newport Dock Co.* (3) At all events, the verdict ought to be for nominal damages only.

KELLY, C.B. I am of opinion that this rule ought to be discharged. The action has been said to be one of contract, but in point of fact the statement of the contract in the declaration seems to me to be made by way of inducement only, and the substantial complaint is rather of a tort than of a breach of contract. The contract was that the defendants should supply the plaintiff with a gas pipe from the main to a meter under the plaintiff's staircase, and the mischief for which damages are sought to be recovered arose thus:—The pipe having been laid down required testing, and in order to test it, gas was laid on and the pipe was filled. This was done without any notice to Bates, the gasfitter. The defendants sent no one to test the pipe, but on the night of the accident, one Sharratt, the servant of Bates, was told there was an escape of gas. On hearing this, he went, not for the purpose of testing the defendants' pipe but of examining Bates's work, and of attempting to discover the cause of the escape, into the plaintiff's shop with a lighted candle, and an explosion ensued, doing the damage for which the plaintiff now seeks to render the defendants liable. Now, it is clear that the injury was not caused entirely by the mere act of the defendants in furnishing an insufficient pipe. But the gas having escaped by reason of that insufficiency, was exploded in consequence of the lighted candle being brought

(1) 7 Bing. 211. (2) 3 C. B. 1. (3) Law Rep. 1 Ex. 177.

in contact with it, and thus from the two causes conjointly, the defect in the defendants' pipe and the imprudence of Sharratt, in introducing a lighted candle into the shop, the accident happened. Under these circumstances, if Sharratt had been a servant of the plaintiff there would have been contributory negligence. Here, however, he was the servant of Bates, the gasfitter, and unless Bates is, for this purpose, identical with the plaintiff, this is not a case in which the plaintiff contributed to the accident, for the owner of premises cannot be held liable for the negligence of independent tradesmen. Neither can he be disentitled to recover because their joint negligence concurs to cause an injury; otherwise, if a number of independent tradesmen were employed on his premises in various capacities, and for different purposes, the result might be that he would find himself without a remedy against any for an injury arising from separate acts of negligence by each. Suppose, for instance, carpenters and bricklayers happened to be employed at the same time, as in this case, Bates the gasfitter, and the defendants the gas suppliers, were employed, and damage arose from the negligence of both. The carpenters might shift the responsibility on to the bricklayers, or the bricklayers on to the carpenters, and thus the person damnified might be left without a remedy. But such is not the law. If a man sustain an injury from the separate negligence of two persons employed on his premises to do two separate things, as in this case the plaintiff has sustained an injury from the negligence of the gasfitter's servant on the one hand and of the gas company on the other, he can, in my opinion, maintain an action against both or either of the wrongdoers. Here he has thought fit to sue the company, and on the facts proved, their negligence is complete. They laid down an unfit and improper pipe; they turned on the gas without notice to the gasfitter of their intention; they took no precaution by proper testing or otherwise to prevent the gas escaping. Sharratt did not go to test their work, but that of Bates. He was an entire stranger to the defendants, as he was to the plaintiff also. The negligence on their part, therefore, seems to me complete. The jury found that the escape of gas came from a defect in the pipe supplied by the defendants, and that that defect was there when the pipe was supplied. They

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further found, though not directly in answer to any question put to them, that the defendants ought to have caused the pipe to be tested by some competent person. The negligence on their part, accordingly, is clearly established, and the concurrent act of negligence on the part of Sharratt, who was a stranger alike to the plaintiff and the defendants, cannot exonerate them. I think, therefore, that the verdict found at the trial was right, and ought to be sustained.

MARTIN, B. I am of the same opinion. The rule was moved for on two grounds, first, that there was no evidence for the jury on which they could find for the plaintiff; and, secondly, that the damages were excessive, but on neither do I think that it ought to be made absolute. Now the facts of the case on which, without any regard to the form of action, I base my judgment are these:—The plaintiff wanted gas in his shop, and he went to Bates, a gasfitter, to get it laid on, desiring him to communicate with the defendants for that purpose. Bates did so, and the defendants contracted to supply pipes from the main to a meter inside the plaintiff's shop, beneath the staircase. Bates was to fit the interior pipes, the defendants were to supply them, and also to supply the inside meter. Such in substance is the contract as stated in the declaration, which seems to me to be rather in contract than in tort. Then the defendants supplied a pipe with a hole in it; the gas escaped, and Bates' servant going near it with a light, an explosion ensued, and the damage was done. But although it would not have been done except for the act of Bates' servant, there is none the less a clear breach of contract on the part of the defendants, for which I think they are liable. There is, therefore, no ground for entering a nonsuit. Secondly, I am of opinion that the damages are not excessive. Even if Sharratt had been a servant of the plaintiff, his negligence would not have exonerated the defendants from substantial liability for their breach of contract. It is not because a man's servant is guilty of negligence that another person, who has contracted to do a particular thing and has not done it, is to be exonerated from the consequences of a breach. Far less is he to be exonerated by the act of a stranger, as I think Sharratt was. There is, there-

fore, no case of contributory negligence here, even supposing the real cause of action to be, not, as I conceive, for a breach of contract, but for a breach of duty. For these reasons I am of opinion that whether the defendants have committed a breach of contract, or been guilty of a breach of duty, they are liable to pay substantial damages, and the rule should be discharged.

CHANNELL, B. I am also of opinion that this rule should be discharged. I agree in the view of the facts which has been presented by the Lord Chief Baron and my Brother Martin. With regard to the discussion as to the form of action, I attach no importance to it for the purposes of this rule. Whether the defendants are to be considered liable for a breach of contract or duty, seems to me, for the present purpose, not to be material. Their contract, I may observe, however, does not appear to have been one which imposed on them the necessity of supplying absolutely perfect and gas-tight pipes in the first instance. It would not be reasonable to expect that there should be no leakage whatever from them, either at the joints or elsewhere, when first laid down. I think the real obligation of the defendants was to have the pipes laid down so as to be perfect after a proper test. But this interpretation does not relieve them from liability, for the pipes were left in an imperfect condition. They were not tested at all by the defendants, or supposing Sharratt to have been testing them on the defendants' behalf when the explosion took place, a supposition not borne out by the evidence, there would still be a breach of duty in the defendants for which they ought to be held responsible; for in that case his act in using a lighted candle under the circumstances would be an act of negligence for which they would be liable to answer.

PIGOTT, B. I am of the same opinion. I think, irrespective of any question as to the form of action, that the plaintiff is entitled to recover. The jury have found, in effect, that the defendants were guilty of negligence, and that the mischief complained of resulted from such negligence; and although, if the question were to be simply regarded as one of contract, the consideration whether the defendant's conduct was the proximate or remote cause of the

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accident might arise, still, regarding the question as one of negligence, the mere fact of another cause having co-operated with the main cause does not make the main cause remote, though it may give rise in this particular case to the question, whether the doctrine of contributory negligence applies. Now here the escape of the gas and its ignition was the proximate cause of the injury, but the defective condition of the pipe was the main or efficient cause, and for that defect the defendants are responsible, unless the plaintiff himself contributed to the explosion. That brings us to the real question, which is, whether the plaintiff was in any way to be considered as identical with Sharratt. I think he was not. Bates and the company were in the position of two independent tradesmen employed to do certain work in the plaintiff's house conjointly, and the plaintiff was not responsible for the negligent conduct of the servants of either. Both were guilty of negligence, and he could in my judgment recover against both, or either. In another aspect of the case, indeed, the defendants might be said to have turned on the gas with an intention and expectation that Bates would test the pipes, and then there can be no doubt they would be liable for Sharratt's act. He would then have been, in fact, their own servant. In whatever way this case is regarded, therefore, I think the plaintiff is entitled to recover.

Rule discharged.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorney for defendants: *Meredith.*

THE QUEEN *v.* EAVES.

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Jan. 21.

Excise Prosecution—Notice of Appeal—Notice of Hearing—Service on Convicting Magistrates—7 & 8 Geo. 4, c. 53, s. 83—4 Vict. c. 20, s. 30.

Where an adjudication by justices on an information under the Excise Act (7 & 8 Geo. 4, c. 53), is appealed against, notice of appeal must, by s. 83, be served on the justices :—

Held, that service in court upon the clerk to the justices, in their presence, was good service.

Notice of hearing of the appeal is also by 4 Vict. c. 20, s. 30, required to be served on the respondent at his place of abode :—

Held, that such notice must be served on the person laying the information, and that service at the office of excise was insufficient, although by 7 & 8 Geo. 4, c. 53, s. 61, no information can be exhibited under the Act except by the order of the commissioners of excise.

CASE stated for the opinion of the Court under 7 & 8 Geo. 4, c. 53, s. 84 (1), by the Recorder of Liverpool.

On the 15th of June the appellant was convicted before two justices of Liverpool, under 7 & 8 Geo. 4, c. 53, s. 32 and s. 65, on an information by Benjamin Evans, an officer of excise, for being concerned in the removal, deposit, and concealment of excisable goods. Immediately on the conviction being pronounced, the appellant's counsel stated, verbally, in court, that his client would appeal, and about the same time his attorney served on the clerk of the magistrates a notice of appeal under s. 82, which gives an appeal to the quarter sessions, the two convicting magistrates and the clerk being then in court, and also handed to the attorney of the informer a copy of the notice, the informer being present at the hearing. The clerk to the magistrates immediately handed back the notice, stating that he declined to accept it; but the appellant's attorney insisted that the notice was sufficient.

On the 17th of June a notice was served on a clerk in the office of the clerk of the peace for the borough of Liverpool.

On the 5th of July the appellant served a notice of the hearing of the appeal on clerks at the respective places of business (not

(1) 7 & 8 Geo. 4, c. 53, s. 84 :— "... It shall be lawful for such ... justices of the peace at such general quarter sessions ... at their discretion, to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer."

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being the residences) of each of the justices (1), and on a clerk at the excise office of the borough of Liverpool.

By 7 & 8 Geo. 4, c. 53, s. 83, "no such appeal as aforesaid (under s. 82) shall be allowed, unless the party or parties appellant shall at and immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the . . . justices of the peace . . . from whose judgment such appeal shall be made, and also to the adverse party or parties on such appeal, and shall lodge such notice . . . with the clerk of the peace at such general quarter sessions as aforesaid . . . and no such appeal as aforesaid shall be heard unless the party or parties appellant on such appeal shall, within one week at least before such appeal is to be finally adjudged and determined, give notice in writing to the adverse party or parties on such appeal, of the time and place when such appeal is to be heard."

By 4 Vict. c. 20, s. 30, "the notice of the time and place when and where any appeal . . . to the justices assembled at the quarter sessions of the peace is to be heard, shall be given on the part of the appellant to, or left at the place of abode of the respondent, seven clear days at least before such appeal is to be heard and determined."

By 7 & 8 Geo. 4, c. 53, s. 61, no information for penalties can be exhibited except by the order of the commissioners of excise, and by 4 & 5 Wm. 4, c. 51, s. 28, any penalty may be sued for and recovered by order of the commissioners of excise, and in the name of an officer of excise.

At the hearing of the appeal, it was objected on the part of the then respondent that the service of the notices of appeal, or at all events of the notices of hearing, was insufficient, and the learned Recorder stated this case for the opinion and direction of the Court. (2)

L. Temple, for the appellant, contended that the service on the magistrates' clerk was service on them; and that with respect

(1) No decision was pronounced on the necessity, or (if necessary) the sufficiency of this service.

(2) It was not stated in the special case what course had been taken on the hearing of the appeal, but it appeared that the objections, or some of them, were allowed by the Court.

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to the notice of hearing, the real prosecutors in the proceeding were the commissioners of excise, the nominal prosecutor acting by their order (7 & 8 Geo. 4, c. 53, s. 61); service therefore was properly effected by leaving the notice with the clerk at the excise office.

C. Russell, for the respondent, contended that the service of notice of appeal on the magistrates must be personal; and that the Act, 4 Vict. c. 20, s. 30, by using the words "at the place of abode of the respondent," made it clear (if it were otherwise doubtful) that the actual respondent was intended, that is the person in whose name proceedings were taken, and who was interested in the penalty.

THE COURT (Kelly, C.B., Martin and Pigott, BB.) held that service in court of the notice of appeal on the clerk to the magistrates was good service on the magistrates; but that the Acts required service of the notice of hearing to be made on the person by whom the information was laid, and that therefore service on a clerk in the excise office was insufficient; fresh notices of hearing must therefore be given.

Case remitted. (1)

Attorneys for appellant: *Vizard & Co., for Tebay & Lynch, Liverpool.*

Attorney for respondent: *The Solicitor of Inland Revenue.*

(1) It was, however, understood that the appeal was to be heard by agreement, without any fresh notices being required.

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Jan. 21.

In the Matter of the ROYAL LIVER FRIENDLY SOCIETY.

Stamps—Exemption from Duty—Friendly Society—Investment of the Funds of a Friendly Society in Securities—18 & 19 *Vict. c.* 63, *s.* 37.

6 Ex 190

The Friendly Societies Act (18 & 19 Vict. c. 63, s. 37) does not exempt from stamp duty securities on which the funds of a friendly society are invested.

Case stated by the Commissioners of Inland Revenue under 13 & 14 Vict. c. 97, s. 14, on an appeal against their decision as to the liability to stamp duty of a deed, transferring to the trustees of the Royal Liver Friendly Society a mortgage for 1100*l.*, the transfer containing a declaration that the money was advanced out of the funds of the society. The commissioners, whose opinion was requested under 13 & 14 Vict. c. 97, s. 14, and 16 & 17 Vict. c. 59, s. 13, charged a duty of 5*s.* 6*d.* ad valorem (under 28 & 29 Vict. c. 96, s. 17) and 5*s.* 6*d.* progressive duty, and from this decision the trustees appealed.

The society was one established previously to, but now regulated by, 18 & 19 Vict. c. 63, which amends and consolidates the law relating to friendly societies, and the trustees claimed exemption from stamp duty under s. 37. (1)

By their 9th rule, it is one of the duties of the committee of management to negotiate all money transactions, order and direct

(1) By 18 & 19 Vict. c. 63, s. 37, "no copy of rules, nor power, warrant, or letter of attorney, granted by any person as trustee of any society established under this Act or any of the Acts hereby repealed, for the transfer of any share in the public funds standing in the name of such trustee, nor any order or receipt for money contributed to or received from the funds of any such society by any person liable or entitled to pay or receive the same by virtue of the rules thereof or of this Act, nor any *bond* to be given to or on account of any such society, or by the treasurer or any officer thereof, nor any draft or order, nor any form of policy, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other document whatever required or authorized by or in pursuance of this Act, *or the rules of any society*, shall be liable to stamp duty;" excluding from the benefit of the exemption any society which assures the payment of money exceeding 200*l.*, or which assures the payment of money on the death of a member to any person except certain specified persons.

In the corresponding section of the repealed statute of 10 Geo. 4, c. 56, s. 37, after the word *bond* stood the words *nor other security;* the words *or the rules of any society* occurred for the first time in the present statute.

how, when, and upon what security the funds of the society shall be invested, and execute all the powers vested in them by 18 & 19 Vict. c. 63 (ss. 17—19).

By the 11th rule, defining the duties of the trustees, it is provided that "all moneys shall be invested in the Bank of England, savings banks, and other securities, in their name."

C. Russell, for the appellants. Under the corresponding section in the repealed Act (10 Geo. 4, c. 56, s. 37), it was decided in *Walker* v. *Giles* (1), and in *Barnard* v. *Pilsworth* (2), that mortgages to a society were within the exemption, and the same was held in *Thorn* v. *Croft* (3), by Wood, V.C., who extended the decision to the case of mortgages to the society by persons not members of it. It is true that the words "nor other security" are not found in the most recent Act; but, on the other hand, the words "any other documents" are extremely general, and the legislature seems to have contemplated an extension rather than a restriction of the benefit, for they add to the words "required or authorized by or in pursuance of this Act" the words "or the rules of any society." It cannot be denied that this transfer is so authorized.

Sir R. P. Collier, A. G. (*Sir J. D. Coleridge, S. G.*, and *C. Hutton*, with him), for the commissioners, was not called upon.

KELLY, C.B. The Act exempts from duty all documents required or authorized by the rules of the society, and no doubt the society by its rules authorizes the trustees to invest their funds in mortgages of real estate. But the question is whether, looking at the whole of s. 37, it only exempts documents required or authorized for the purpose of carrying on the internal affairs of the society, or required or authorized for the purpose of bringing the society into a position to carry on business with the outside world, or whether it also exempts all documents which may become necessary in the course of carrying out that business. We should have expected very express and specific language, if it had been intended to exempt securities to so large an amount as, on this view, the statute would include. But, on the contrary, when we read the earlier part of the section, we find that

(1) 6 C. B. 662, 696; 18 L. J. (C. P.) 323, 329.

(2) 6 C. B. 698, n.; 18 L. J. (C. P.) 330, n.

(3) Law Rep. 3 Eq. 193.

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the instruments there enumerated all relate to matters of a comparatively small amount, and are of the character I have mentioned; and the general words must be construed by reference to the particular terms which precede them, and must be taken to refer to matters ejusdem generis with them. But we have had presented to our attention the case of *Walker* v. *Giles* (1), followed by other cases, in which it was held that the words of the corresponding section of the earlier Act applied to mortgages made to the society by strangers, and were not confined to mortgages by their own members. In that Act, however, the words "nor other security" occurred after the word "bond," and it is possible, and I am far from thinking it improbable, that those words were omitted by the legislature in consequence of the decision in that case. What the legislature meant was to exempt transactions relating to small sums, and to official acts and the conduct of internal business; they therefore left out the words "nor other security" for the purpose of confining the exemption to bonds, and to such bonds as are required in the administration of the society's affairs. If the transfer of a mortgage to the society is exempt, it is impossible to exclude from the exemption the case of an original mortgage to them, where by universal usage the duty, with the other costs of conveyance, is to be paid not by them, but by the mortgagor. It is impossible without clear words to suppose that the legislature can have done anything so mischievous or so contrary to equity as to extend exceptional privileges not only to the society, but to all those who deal with it. We must therefore either read the words as applicable only to cases where, by usage or under the contract, the society would have to pay the duty, for which, however, there is no authority, no such limitation being expressed in the Act; or we must read the section as referring to acts, such as a power of attorney, which bring into existence or create the possibility of negotiation, acts which are in a manner exclusively the acts of the society, or of its officers and members in their relation to it and to one another.

MARTIN, B. I am of the same opinion. It is obvious, both from 10 Geo. 4, c. 56, and 18 & 19 Vict. c. 63, that the object

(1) 6 C. B. 662; 18 L. J. (C. P.) 323.

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of the legislature was to relieve these societies and their members from stamp duty in respect of documents immediately connected with the society. The conclusion was drawn in *Walker* v. *Giles* (1), from the peculiar words of the earlier Act, that its operation extended to mortgages made to the society; but my impression is, that it was never intended that strangers borrowing money of such societies should be put in a different position from other persons. Now I agree that if transfers of mortgages are exempted, then equally original mortgages are exempted, where, according to the universal course of business, the duty is paid, not by the lender, but by the borrower. But this would be to secure a benefit, not to the society, but to those who borrow of it. Now, if the words in this section are read in their ordinary meaning, there is no word applicable to this case; but moreover, I think that the words "nor other security" are omitted for the very purpose of preventing this question arising. The Court of Common Pleas had thought that mortgages were within the terms of the previous Act, and it is clear that the words they relied on were those very words which are now left out. Further, my impression is that the word "bond," which occurs in both the earlier and the present section, refers, not to a loan or investment of the society's funds in or upon bonds, such as the Harbour Bonds of the Mersey Docks, but to bonds given, whether with or without sureties, by clerks, agents to receive money, and others, as security for their duly accounting or otherwise discharging the functions of their office. That, I think, also, was the nature of the "security" mentioned in the earlier Act; but a more extensive meaning having been attributed to it, the word was afterwards omitted. Then the question comes to this, whether the words in the latter part of the section, read in conjunction with the instruments previously enumerated, where bonds are mentioned, but securities are omitted, are not to be confined to instruments ejusdem generis. I concur in thinking that they are, and that this mortgage was not within the meaning of the section.

PIGOTT, B. I am of the same opinion. If this question had arisen under the old Act, I should have agreed with the Court of

(1) 6 C. B. 662; 18 L. J. (C. P.) 323.

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Common Pleas in *Walker* v. *Giles* (1), that, giving their fair meaning to the words, they were large enough to have embraced this mortgage; but I can find no words in the late Act shewing an intention to create so wide an exemption, the very words relied on in that case being omitted. The only ground of argument in favour of the exemption is, that the words "any other document whatever required or authorized by or in pursuance of this Act, or the rules of any society," are even larger than the corresponding words in the earlier Act, and are sufficiently wide to include this case. But I agree with my Lord and my Brother Martin that we must read this language with reference to the preceding words, and that such documents as they have described will satisfy the meaning of the Act.

Judgment for the Crown.

Attorney for society: *Makison & Carpenter.*
Attorney for commissioners: *The Solicitor of Inland Revenue.*

Jan. 21.

IN THE MATTER OF BOLTON'S LEASE.

Stamps—Lease made for a Further or other Valuable Consideration—Building Lease—17 & 18 Vict. c. 83, s. 16.

A lease made in consideration of a rent, and also of a covenant to complete houses, is a lease made "for a further or other valuable consideration" besides the rent, within 17 & 18 Vict. c. 83, s. 16, and is chargeable with a deed stamp beyond the ad valorem duty.

CASE stated by the Commissioners of Inland Revenue, under 13 & 14 Vict. c. 97, s. 14, on an appeal by the lessee against their determination as to the amount of stamp duty chargeable on a lease.

The lease, made between George Bolton and Edward Bolton, was expressed to be made "in consideration of the yearly rent, covenants, and agreements hereinafter reserved and contained;" and demised for ninety-nine years, at the yearly rent of eight guineas each, four pieces of land, and four unfinished houses thereon; it contained the usual covenants for repair, &c., and also a covenant, within six months from the date, to "complete and

(1) 6 C. B. 662; 18 L. J. (C. P.) 323.

But the 33 & 34 Vict c 44. by which this decision is overruled.

make fit for use in every respect each of the said messuages," with fixtures, &c., to the satisfaction of the lessor's surveyor.

The commissioners, whose opinion was required under 13 & 14 Vict. c. 97, s. 14, charged the lease with an ad valorem duty of 30*s.* (under 17 & 18 Vict. c. 83, sched. "Lease;" 13 & 14 Vict. c. 97, sched. "Lease") in respect of the yearly rent of 33*l.* 12*s.*; with a further duty of 35*s.* as for a separate lease made for a further or other valuable consideration—that is to say, a lease not otherwise charged (under 13 & 14 Vict. c. 97, sched. "Lease;" and 17 & 18 Vict. c. 83, s. 16), and with 10*s.* progressive duty.

By 17 & 18 Vict. c. 83, s. 16, . . . in any case where any deed or instrument which shall be chargeable with any ad valorem stamp duty in respect of any sum of money yearly or in gross . . . shall be made also for any further or other valuable consideration, such deed or instrument shall be chargeable (except where express provision to the contrary is or shall be made in any Act of Parliament) (1), with such further stamp duty as any separate deed or instrument made for such last-mentioned consideration alone would be chargeable with, except progressive duty.

By 13 & 14 Vict. c. 97, sched. "Lease," a "lease or tack of any kind not otherwise charged" is charged with a duty of 35*s.*

Manisty, Q.C., for the appellant. If the covenant to complete the houses in the present lease were held a "further or other valuable consideration," the same must be held with respect to covenants to repair; such covenants occur in every lease, and the lease is always expressed to be made in consideration of the performance of the covenants as well as of the payment of the rent. If it is impossible to hold that the legislature intended by a side-wind to put a double tax upon all leases, it will be equally impossible to bring the present case within the provision; for no clear distinction between the different kinds of covenant can be drawn, so as to include a covenant to complete houses, which may only cost a few pounds, and exclude a covenant to repair, which may cost many pounds annually. The present lease contains a covenant to make

(1) A proviso in 13 & 14 Vict. c. 97, sched. "Lease," exempts from any stamp duty, except ad valorem duty, leases expressed to be granted in consideration of the surrender of an existing lease, and also of a sum of money.

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and maintain a footpath; what test would determine whether that was most akin to a covenant to complete or a covenant to repair? The true construction of the section is to refer it, not to matters which are naturally incident to the contract of letting, but only to considerations which are wholly collateral to, and only casually connected with, it.

Sir R. P. Collier, A. G. (*Sir J. D. Coleridge, S. G.*, and *C. Hutton*, with him), was not called on.

Kelly, C.B. It is unnecessary to deal with imaginary cases; the words of the statute are clearly applicable to that which is before the Court. The Act imposes a further duty whenever an instrument, chargeable with an ad valorem duty in respect of a sum of money yearly or in gross, is also made "for any further or other valuable consideration." Now this lease contains both those subjects which are respectively dealt with by the Act; it is made in consideration not only of a yearly rent, but also of a covenant to complete, within six months, the four houses included in the demise. The sum to be spent upon them may be more or less considerable, but we must take it that it will be of a substantial amount. There can, therefore, be only one answer to the question whether this covenant is not a further or other valuable consideration; and this is the more clear when it is asked whether, if there were a demise only upon the terms of completing and keeping in repair houses without rendering any rent, the lease must not be said to be made for a valuable consideration.

Martin, B. The 16th section of 17 & 18 Vict. c. 83, seems to have been enacted to meet this very case. The former Acts provided for leases with a fine, for leases without a fine, and for leases not otherwise charged; but the present case not being in the contemplation of the framers of those Acts, was not provided for; that defect was therefore remedied by the later statute.

Pigott, B., concurred.

Judgment for the Crown.

Attorney for appellants: *Boulton & Son.*
Attorney for commissioners: *The Solicitor of Inland Revenue.*

IN THE MATTER OF STUCLEY'S SETTLEMENT. 1870

Stamps—Settlement—Money to be laid out in Land—13 & 14 *Vict. c.* 97, *Sched.* "*Settlement.*" *Jan.* 21.

By articles of settlement it was recited that part of the property to be settled consisted of lands purchased (under a power), to the amount of 52,000*l.*, out of trust moneys subject to an earlier settlement, and held by trustees on trust for sale, and in the meantime to be considered in equity as money, and, as well as the proceeds of sale, to be subject to the trusts of the settlement; and it was agreed that the property should be settled (and as to the lands, without prejudice to the trust for sale), upon certain trusts, with a proviso that if, when the property (which was subject to a life estate), should become subject in possession to the trusts of the settlement to be executed, the lands should not have been sold, the trustees might, with the consent of the husband and wife, or the survivor, and afterwards at their own discretion, accept a conveyance of them in lieu of the trust moneys, upon the like trusts for sale, such power of sale not to be exercised during the lives of the husband and wife and the survivor, without their, his, or her consent:—

Held, that the articles were not, under 13 & 14 Vict. c. 97, sched. "Settlement," subject to an ad valorem stamp duty on the 52,000*l.*, as a definite and certain principal sum to be laid out in the purchase of lands.

CASE stated by the Commissioners of Inland Revenue under 13 & 14 Vict. c. 97, s. 14, on an appeal against their determination as to the amount of stamp duty chargeable on articles for a settlement on the marriage of Sir G. S. Stucley and Rosamond Head Best.

The articles, which were dated the 13th of April, 1869, recited that the fortune of the lady consisted (amongst other things) of property settled in 1839, on the marriage of her parents, and then vested in trustees upon the trusts of the settlement, under which, subject to her father's life estate, she took, as only child of the marriage, an absolute interest; and that such trust funds then consisted, first, of certain freehold estates in the counties of Wilts and Berks, purchased under a power in the settlement out of the trust moneys (to the amount of 52,000*l.* and upwards), and which were held by the said trustees in trust to be resold, and in the meantime to be considered in equity as money and to be subject (as well as the proceeds of sale thereof) to the same trusts as the moneys laid out therein; secondly, the sum of 16,000*l.* secured

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on mortgage, and, thirdly, the sums of 4876*l.* 13*s.* 4*d.* Consols, and 11,196*l.* 4*s.* New Threes.

It was by the articles agreed that the estate or interest of the wife in the abovementioned trust moneys, stocks, and property, should be settled upon the trusts thereinafter mentioned, and "in respect to the hereditaments purchased as aforesaid, without prejudice to the said trust for the resale thereof." In the statement of the trusts to be declared by the settlement, it was provided that if, when the abovementioned funds and premises should become subject in possession to the trusts thereof, the hereditaments purchased or otherwise acquired under the powers of the settlement of 1839 should not have been resold, the trustees of the present settlement might, with consent of the husband and wife, or the survivor of them, and afterwards at their own discretion, accept in lieu of the sale-moneys a conveyance of such hereditaments, upon the like trusts for sale, and with the like powers of exchange and demise as were expressed in the settlement of 1839, such powers of resale and exchange not to be exercised during the lives of the husband and wife, or the survivor, without their, his, or her previous consent in writing, and the moneys to arise from such sale or exchange, and the hereditaments subject to sale, to be held on the trusts agreed to be declared with respect to the proceeds of sale of the hereditaments originally purchased.

The commissioners charged the deed, under 13 & 14 Vict. c. 97, sched. "Settlement," with an ad valorem duty on the 52,000*l.* and on the stock, as well as on the 16,000*l.* secured by mortgage. The trustees appealed.

By 13 & 14 Vict. c. 97, sched. "Settlement," "Any deed or nstrument . . . whereby any definite and certain principal sum or sums of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands, or other hereditaments, or heritable subjects, or not), or any definite and certain share or shares in any of the government or parliamentary stocks or funds . . . shall be settled or agreed to be settled upon for the benefit of any person or persons either in possession or reversion, either absolutely or for life, or other partial interest, or in any other manner whatsoever," is subjected to a duty of 5*s.* per cent.

Digby, for the appellants. The statute only charges a settlement in respect of a definite and certain sum to be laid out in the purchase of lands, but it does not appear that any such sum is here settled. It appears from the recital, that some definite sum, of which 52,000*l.* was part, was by the settlement of 1839 settled in this manner, and on that sum duty must accordingly have been paid under the corresponding statute then in force (55 Geo. 3, c. 184, sched. pt. 1, "Settlement.") But what exists at present and is now agreed to be settled is land, and that land is not to be sold without the consent of the husband and wife or the survivor of them. All that is known about any sum of money is that 52,000*l.* was once laid out in the purchase of the land, but the amount of the purchase money and the source from which it was derived are wholly immaterial. If it had been meant to tax lands in this condition some provision for their assessment would have been made, as in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 30, 31. If it should be held that the land so purchased is to be included in the duty, it will follow that the stock is not; for it appears it is part of the same fund and is therefore subject to the same trust for investment in land; but the statute only makes money so settled and not stock subject to the duty. He cited *Guidot* v. *Guidot* (1); *Crabtree* v. *Bramble*. (2)

Sir R. P. Collier, *A. G.* (*Sir J. D. Coleridge*, *S. G.*, and *C. Hutton*, with him), for the commissioners. The trust funds were, under the old settlement, to be considered as money, and their character is preserved by the present articles. They are, therefore, still money, and, the actual amount laid out in the lands being stated, that amount is a definite and certain sum. With respect to the stock, whatever trust as to its investment in land may have been created by the settlement of 1839 there is no such trust created by these articles; it is therefore directly within the words of the statute.

KELLY, C.B. It is impossible to maintain this charge. The Act imposes a tax on deeds by which "a definite and certain principal sum" is settled, and here the insuperable difficulty occurs that there is no definite and certain sum, nor can there be until the

(1) 3 Atk. 254. (2) 3 Atk. 680, 687.

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land is sold; and further, when the land is sold, the sum realised may be double the amount originally laid out, or may be only half that sum. What is settled is land, and if the legislature had intended to impose a stamp duty on the settlement of land they would have provided a machinery for the assessment of its value, as is done in the Succession Duty Act. It was argued by the Attorney General that the sum was, at the time of the original settlement money, and was by that settlement to be laid out in land. Certainly the sum of 52,000*l.*, or rather a sum of which the 52,000*l.* formed part, was so settled, and was at that time within the terms of the Act then in force. But when the money was once invested it ceased to be money; the money was gone, and land was substituted for it. There was, therefore, no longer any definite or certain sum; the land which was settled was not within the words of the Act, and, it might be very mischievous and unjust if we were to extend the words as we are asked to do, and to rate land at the price for which it was originally bought. For certain purposes, no doubt, land subject to trusts for sale is treated as money, where, for instance, a question of testamentary construction arises, or where, in the case of intestacy, it passes to the next of kin and not to heirs; but in order to bring it within the words of this section it must not only be treated as, but must be, a definite and certain principal sum of money.

With respect to the stock, it is equally clear that the duty is rightly charged. The only ground for argument is that this stock formed part of money to be laid out in land, and that with respect to stock the words "whether charged or chargeable on lands, &c.," are not repeated. But although the legislature may have thought fit ex abundanti cautelâ to insert those words after "money," in order to prevent the application of the equitable doctrine as to money coming under that description being land, we cannot for that reason overrule the express words of the statute, which charges with duty deeds by which any definite and certain share in the government stocks is settled.

MARTIN, B. I am of the same opinion. When the case is clearly understood, the claim to duty on the 52,000*l.* is not arguable. The duty is payable only if a definite and certain sum

is settled. Now, in this deed the only reference to any sum of 52,000*l.*, is in a recital, which states that that amount has been laid out in the purchase of land out of a fund which was the subject of a previous settlement. We are only told indirectly what the trusts of that settlement were, but it is argued that as the lands were held in trust for resale, and were "in the meantime to be considered in equity as money," therefore, they are money. I think that the Lord Chief Baron has stated the true effect of those words; and to make the matter clearer, it is provided in the articles that if, when the property comes into possession, the land remains unsold, the parties are to be entitled to take it in lieu of money. Moreover, if any sum is to be assessed, it must be the amount which the land would bring if it were sold, but that amount is as uncertain as possible; there is, therefore, no certain and definite sum on which the duty could be assessed.

PIGOTT, B. I am of the same opinion. It is a fallacy to say that this is the settlement of a definite and certain sum; the commissioners would, in truth, know nothing of any definite sum, but from the accidental mention in the recital of the sum of 52,000*l.* as having been invested in land. By that settlement, no doubt, the money so invested was to be dealt with as money; but there being only one child of the marriage, it became unnecessary to exercise the power of sale for the purpose of division of the fund, and at the time when these articles of settlement were executed it was still land. It is settled as such, with a power to sell, it is true, but also with a power to keep it in its existing condition. There is, therefore, no definite and certain sum on which duty can be assessed.

Judgment for the appellants as to the 52,000*l*, *for the Crown as to the stock.*

Attorneys for appellants: *Law, Hussey, & Hulbert.*
Attorney for commissioners: *The Solicitor of Inland Revenue.*

1870
Jan. 28.

HENDERSON *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Carriers Act—11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68, *s.* 1—*Pictures*—*Frames.*

Where framed pictures are sent by a carrier, the frames, as well as the pictures, are within the Carriers Act.

THE plaintiff, having sent framed pictures by the defendants' line without declaring them under the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68, s. 1), the pictures and frames were lost, and the plaintiff sued the defendants for their value in the Passage Court, Liverpool.

It was contended at the trial that although the plaintiff could not recover for the pictures, he could for the frames; and *Treadwin* v. *Great Eastern Ry. Co.* (1) was relied on.

A verdict was taken for the value of the frames, the learned assessor reserving leave to the defendants to move to enter a verdict for them. A rule having been obtained accordingly,

L. Temple shewed cause. According to *Wyld* v. *Pickford* (2), the owner cannot recover for a package containing articles within the statute and not declared, and which is used for no other purpose; but *Bernstein* v. *Baxendale* (3), shews that where such articles form only part of the contents of a parcel, the carriers are not freed from liability with respect to the remaining contents and the case which incloses the whole; and that principle was followed out in *Treadwin* v. *Great Eastern Ry. Co.* (1), so as to allow the plaintiff to recover for a frame which accompanied and protected an article of lace; that case governs the present, for a frame is no more essential to a picture than to a piece of lace.

Quain, Q.C., and *C. Russell*, were not called on to support the rule.

KELLY, C.B. I think the whole parcel was within the Act. As to the lace "corporal" in *Treadwin* v. *Great Eastern Ry. Co.* (1), it

(1) Law Rep. 3 C. P. 308.
(2) 8 M. & W. 443.
(3) 6 C. B. (N.S.) 251; 28 L. J. (C.P.) 265.

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is a thing which by the description given of it, appears in general, and in its ordinary mode of use, not to require a frame, and to have none, but which was framed only to secure it a safe transit; the frame was, therefore, no part of the article, but only incidental to it. But pictures are, in general, encompassed with frames; and the frame not only forms part of the picture, but is ordinarily as necessary for its security as the outside package in which it is sent. I think, therefore, the rule should be made absolute.

MARTIN, B. I am of the same opinion. It is a question of fact. Now, in common language, it would be said that a picture, consisting of the canvas, the painting, and the frame, is one entire thing; and it might as well be contended that the plaintiff could recover for the canvas alone, or that if jewelry were sent in jewel cases, the owner could recover for the cases, though not for the jewels, as that the plaintiff can here recover for the frames of the pictures apart from the pictures themselves. In the common sense and understanding of mankind the whole is one thing.

PIGOTT, B., concurred.

Rule absolute.

Attorneys for plaintiff: *Johnson & Weatheralls, for Snowball & Co., Liverpool.*

Attorney for defendants: *Blenkinsop.*

1870
Jan. 31.

PREHN and Another *v.* THE ROYAL BANK OF LIVERPOOL.

Letter of Credit — Bill of Exchange — Action by Drawer against Acceptor — Damages.

The defendants, bankers at Liverpool, by their letter of credit to the plaintiffs, grain merchants at Alexandria and Liverpool, undertook to accept the drafts of the plaintiffs' Alexandria firm, the plaintiffs undertaking to put them in funds to meet the bills at maturity, and the defendants receiving ½ per cent. for the accommodation. Bills were accepted by the defendants under this arrangement, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due, the defendants' bank stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying 2½ per cent. commission; they were also obliged to pay to the holders the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expense in telegraphic communications between Liverpool and Alexandria. In an action against the defendants for breach of the contract contained in their letter of credit:—

Held, that the plaintiffs were entitled to recover the commission and the notarial and telegraphic expenses.

ACTION against the defendants for breach of the contract contained in their letter of credit to the plaintiffs, by refusing to honour their acceptances of the plaintiffs' drafts. (1)

(1) Declaration. — That plaintiffs' Alexandria firm being about to purchase and ship to England for sale cotton and grain, it was thereupon agreed by and between the plaintiffs and the defendants, for commission and reward to the defendants in that behalf, that the defendants should accept drafts drawn by the plaintiffs' Alexandria firm upon the defendants for the payment of the price of the said cotton and grain, and that the plaintiffs should from time to time pay over to the defendants the proceeds of the sale of the said cotton and grain, to be appropriated by the defendants to meet and pay, and that thereout they should meet and pay, the said drafts to be accepted by them as aforesaid, as and when the same should become due and payable; averment, that under and in pursuance of the said agreement, certain drafts were drawn by the plaintiffs' Alexandria firm upon and accepted by the defendants, amounting together to the sum of 21,928*l.*, and before the said drafts or any of them became due the plaintiffs from time to time paid to the defendants, to be appropriated to and for the purpose of meeting and paying the said drafts, moneys in the whole exceeding the said sum of 21,928*l.*, and more than sufficient to meet and pay the said drafts, and the defendants before and at the time of the breaches of agreement hereinafter mentioned had in their hands, under and in pursuance of the said agreement, moneys for the purpose of and appropriated to meeting and paying the said drafts, as and when the

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The plaintiffs carried on business as grain merchants at Liverpool, under the name of Quentell & Co., and at Alexandria under the name of Prehn & Co. For the purpose of buying grain at Alexandria, it was necessary for the plaintiffs to be able to draw on a bank in England; and on the 8th of August, 1867, the Liverpool firm wrote to the defendants the following letter:—

"With reference to our conversation of this morning, in regard to a credit for our Alexandria firm to be used in transactions in grain, we beg to state the nature of the business. The grain to be shipped by our friends is sold in Liverpool or in London before shipment, and the terms of sale are, cash against delivery of documents within seven days after receipt. Our friends would draw on your bank at the time of shipment, and remit to you, either simultaneously or within a very short time, as soon as the shipment is completed, the shipping documents. We would then collect the amount, and pay it over to you; such collection to be considered as in trust, and specially to be applied towards the payment or covering of the drafts of our friends. As the Alexandria drafts on your bank would be at three months date, you would be covered in cash over two months before maturity. We shall be very glad if you will grant our friends this facility, as we see the probability of doing a considerable and safe business just now.

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same became due, exceeding the said sum of 21,928*l.*, and more than sufficient to meet and pay the said drafts; averment of performance of conditions precedent, and breach that the defendants before the drafts or any of them became due and payable, gave notice to the plaintiffs that they would not meet or pay the same when the same became due and payable, and wholly refused and declined to carry out the said agreement on their part; and thereupon the plaintiffs were forced and obliged, at great expense, to make other arrangements for meeting and paying the said drafts, and for providing the funds necessary for that purpose, and afterwards to meet and pay the said drafts, and were put to great costs, charges, and expenses in and about noting and protesting the said drafts, and in and about protecting their credit and the credit of their said Alexandria firm.

Particulars having been obtained of the notarial charges, which the plaintiffs stated to be the sum of 44*l.* 13*s.* 4*d.*, incurred at various times between the 23rd of October and the 9th of November, 1867, and consisting of notarial expenses in Alexandria and Liverpool, of protesting twenty-three bills of exchange for want of better security, and of noting acceptances by Messrs. Marriott, supra protest for the honour of the drawers; the defendants paid that sum into court; and the plaintiffs replied that it was not enough.

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We are prepared to pay you your usual commission of ½ per cent. on such transactions."

On the 9th of August the defendants' manager replied:—

"I beg to inform you, in reply to your note of yesterday, that your firm in Alexandria is at liberty to draw on this company to the extent of 20,000*l.*, in furtherance of grain shipments on the conditions stated."

On the 20th of September, and again on the 14th of October, a new credit was opened for 15,000*l.*, on the same terms as the first for 20,000*l.*

On the 21st of October, 1867, the bank stopped payment, there being at that time running acceptances by the defendants to the plaintiffs' drafts under the above arrangement, to the amount of 21,928*l.*, in respect of which the plaintiffs had paid in to the defendants in the manner above described over 22,000*l.*

On the 22nd, the plaintiffs wrote to the defendants requesting the appropriation of part of the moneys so paid in to cover certain of the current drafts; to which the manager replied on the 23rd of October:—

"Your favour of yesterday has been under consideration, and I regret to inform you I am advised that the moneys lodged by you against the bank's acceptance to your Alexandria firm's drafts cannot under present circumstances be so applied, neither can we make the transfer amounting to 4530*l.* as you request, and accordingly return the two cheques and tickets herein."

The plaintiffs thereupon made arrangements with Messrs. Marriott & Co., cotton brokers, to accept the bills for honour of drawers, paying them 2½ per cent. commission; and proceeded to ascertain the names of the holders of the bills, and to communicate to the Alexandria firm the arrangements which they had made for meeting them. The holders of bills, who presented them for better security, were informed that Messrs. Marriott & Co. would accept them, and, thereupon, according to mercantile usage, they protested the bills for want of better security, and Messrs. Marriott & Co. accepted them suprà protest. In making these inquiries and communications numerous telegrams passed between Liverpool and Alexandria. By this means the plaintiffs were enabled to prevent the bills from being returned to Alexandria;

had the bills been so returned they would have become liable to pay re-exchange, which would have amounted to a much larger sum than the cost of providing for them in the manner actually adopted.

The plaintiffs brought this action against the defendants on the contract contained in their letter of credit, to recover 548*l.* 11*s.* 4*d.* paid for commission; 97*l.* 4*s.* 3*d.* paid for telegraphic, and 44*l.* 13*s.* 4*d.* for notarial, expenses; and the defendants paid 44*l.* 13*s.* 4*d.* into court.

At the trial of the cause, before Hayes, J., at the Liverpool summer assizes, 1869, a verdict was found for the plaintiffs for the sum claimed, leave being reserved to the defendants to move to enter a nonsuit or a verdict for them, or to reduce the damages.

A rule having been obtained accordingly,

Milward, *Q.C.*, and *R. G. Williams*, shewed cause. The defendants are in the same position as bankers who, having assets in their hands, refuse to honour the draft or acceptance of their customer, and who thereupon become liable in damages for their refusal: *Marzetti* v. *Williams* (1); *Rolin* v. *Steward.* (2) Those cases shew that for such a breach of contract general damages may be given; but the claim which the plaintiffs make is only to be reimbursed the actual expenses that have been caused by the refusal, and which are its natural and probable consequences, and within the principle of *Hadley* v. *Baxendale.* (3) The analogy of banker and customer is sound, for, having regard to the arrangement by which money to meet the bills was to be placed in the hands of the bank, the defendants, though acceptors of the bills, were in the same position as if bills had been accepted by the plaintiffs payable at the defendants' bank. But, independently of this analogy, there was here a special contract by the defendants to pay the bills on the terms mentioned in the correspondence, and which have been performed on the plaintiffs' part, in consideration of a commission of ½ per cent. [They cited *Riggs* v. *Lindsay* (4), and Story on Bills, s. 398, and note.]

(1) 1 B. & Ad. 415.

(2) 14 C. B. 595; 23 L. J. (C.P.) 148.

(3) 9 Ex. 341; 23 L. J. (Ex.) 179.

(4) 7 Cranch R. 500. In that case the plaintiff sued the defendant on an implied agreement to accept bills, constituted by the defendant's having in-

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Quain, Q.C., and *Fletcher*, were called on to support the rule. The cases as to the refusal by a banker to honour his customer's draft have no application. Such a refusal represents the customer as having committed a fraud in drawing upon or accepting bills payable at a bank where he has no assets, or, at least, as having made a false statement as to a fact within his own knowledge; and the injury to his credit which this representation causes is the ground on which he is held entitled to damages. But the cause of the refusal here being the insolvency of the bank, no such inference can be drawn, and no such consequence can follow. It is, then, nothing but the ordinary case of dishonour of a bill by the acceptor; and it is settled law that in such a case, as in all cases where the demand is a mere money demand, nothing can be recovered beyond the amount of the bill and interest. The drawer may be liable to the indorser for re-exchange, but the acceptor is not: Byles on Bills, 10th ed. p. 413; *Woolsey* v. *Crawford* (1); and though the drawer may have to pay it, he cannot recover it over against the acceptor. The reason of the rule is, that any damages beyond interest must be wholly uncertain, and must depend upon and vary with the personal ability of the creditor. If the creditor were the house of Rothschild or Baring, who could meet the call without difficulty, no such further damage could ensue; and, on the other hand, the damage might be unlimited. No line could be drawn, and the defaulting party might be called upon to pay for the expenses of raising money by a mortgage of real estates, or

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structed him to purchase goods on defendant's account, and to draw upon him for the price. The bills, having been dishonoured by the defendant, were protested, and returned to the plaintiff, who took them up, and paid the 10 per cent. damages which the law (of South Carolina) allowed to the holders of bills returned under protest. The plaintiff was allowed to recover these damages as well as the amount of the bills.

In *Brown* v. *Stoddard* (10 Metc. 375) the indorsee, suing the acceptor, was only allowed the amount of the bill, with interest and costs of protest; but the Court said (at p. 379): "In cases where drawers have been obliged to take up bills, and pay the damages, because the acceptors suffered them to be protested when they had funds of the drawers in their hands, and were, as between themselves and the drawers, bound to accept, they may recover such damages of the acceptors, because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that an acceptor, as such, is liable to pay damages by reason of his acceptance."

(1) 2 Camp. 445.

the sale of cotton in a falling market. It can make no difference that the plaintiffs here bring their action on the letter of credit; that is merely a preliminary to the obligation upon the bills, and is nothing but a kind of running acceptance to the amount stipulated. The commission of $\frac{1}{2}$ per cent. is no consideration for the bank taking upon itself a liability for unlimited damages, but is merely the ordinary bankers' commission for the use of their name. Letters of credit of this kind are now the medium by which the largest part of foreign commerce is carried on, and no such consequences have ever been supposed to attach to them. It cannot therefore be said that the plaintiffs' claim is in respect of such consequences of the breach of contract as were within the contemplation of the parties. [They cited Sedgwick on Damages, ch. viii. ss. 233-4.]

KELLY, C.B. I am of opinion that this rule must be discharged. It has been pointed out that in an action on a bill of exchange by an indorsee against the acceptor neither general nor special damage can be recovered, the right of the indorsee being limited to the amount of the bill and interest. But in the case before us the action is not brought on the bill, but on a special contract, the incidents of which differ materially from those which belong to the contract constituted by becoming a party to a negotiable instrument, and which are strictly limited by the law merchant. The question presented to us is one of great importance, for the argument has failed to discover any authority bearing on the question, unless we consider the decisions in *Rolin* v. *Steward* (1), and *Marzetti* v. *Williams* (2), to proceed upon an analogous principle. We must decide the case, therefore, on the general principles of law; and, no doubt, according to those principles, where parties have entered into a special contract they are entitled, in case of its breach, to recover in respect of any damage reasonably flowing from the breach. We must therefore look at the contract and the circumstances, and see whether the damage in respect of which the plaintiffs sue was, according to the principle of *Hadley* v. *Baxendale* (3), within the contemplation of the parties. The contract is

(1) 14 C. B. 595; 23 L. J. (C.P.) 148.

(2) 1 B. & Ad. 415.

(3) 9 Ex. 341; 23 L. J. (Ex.) 179.

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one under which a mercantile house, having to obtain credit to a large amount, and being, according to the usages of trade, unable to do so unless they could draw upon a bank, have contracted with a banking company that the latter shall, in consideration of ½ per cent., accept, and at maturity pay, their drafts, the merchants undertaking to supply funds by putting the bank in possession of goods, or the title to goods, which may be converted into money before the bills reach maturity. Bills are drawn under this contract, and are duly accepted, and before maturity the plaintiffs perform their part of the contract by supplying funds to meet the acceptances. The defendants, feeling themselves unable to perform their contract by meeting the bills accepted, very properly inform the plaintiffs of their inability, in order that the latter may resort to such means as they see fit to protect their credit, and to prevent the loss which would be caused by the dishonour of the bills, and their return to Alexandria. The plaintiffs, acting upon this, borrow from Marriott & Co. the sum necessary to meet these bills, and have to pay for the accommodation the sum of 548*l.*; and, further, in order to ascertain who are the holders of the bills, and to communicate the arrangements they have made, so as to prevent the presentment and dishonour of the bills, they necessarily incur expense in telegraphing to Alexandria. By the use of these means they are enabled to prevent the loss of credit and of money which would otherwise have ensued. The question is, whether this was not such a course as was not only reasonable and prudent, but such as any man of business in Liverpool would have resorted to in the like circumstances. It is, no doubt, exactly the course which the defendants themselves would have pursued, and it was, doubtless, with a view to its being pursued that they gave notice to the plaintiffs of their inability to meet the bills; for it is impossible to imagine for what other purpose they gave the information, but that the plaintiffs might protect themselves as they best could against the injury and loss which would otherwise have been incurred. Suppose that, in place of what happened, the bills had been returned to Alexandria, and that the plaintiffs had then brought their action for the expenses so caused, it cannot be doubted that they would have been entitled to recover; and it is not because the defendants properly gave information which had

the effect of preventing that loss that the plaintiffs are disentitled to recover the money necessarily expended for that purpose. And, further, if the bills had simply been dishonoured, and the plaintiffs had brought their action, then, without proof of any such special damage, the jury would, on the principle of *Rolin* v. *Steward* (1), and *Marzetti* v. *Williams* (2), have been entitled to consider all the probabilities and circumstances of the case, and to give reasonable damages accordingly. The plaintiffs are therefore, at least, entitled to recover the money they have necessarily paid to prevent the further loss, and to recover it as general damage.

MARTIN, B. I am of the same opinion; and my impression is, that this is special damage, and not general damage. Mr. Fletcher has referred us to the excellent work of Mr. Sedgwick on Damages; but the passage he cited (ss. 233–4) relates not to a case of this kind, but to an action between a debtor and his creditor, and the damages to which a debtor is liable for nonpayment of his debt. The present contract is contained in two letters; and the result of those letters is, that the defendants are to accept and take up the plaintiffs' drafts, and that the plaintiffs are to keep the defendants in cash to meet the bills. The plaintiffs have fully performed every part of their engagement, and have put the defendants in funds to an amount exceeding the bills they had to meet. The bank, however, were of opinion that they could not, under the circumstances, apply this money to the payment of the plaintiffs' bills, and the result was that they broke their contract, and that the plaintiffs are entitled to maintain this action against them.

Now, with respect to damages in general, they are of three kinds. First, nominal damages; which occur in cases where the judge is bound to tell the jury only to give such; as, for instance, where the seller brings an action for the non-acceptance of goods, the price of which has risen since the contract was made. The second kind is general damages, and their nature is clearly stated by Cresswell, J., in *Rolin* v. *Steward*. (3) They are such as the jury may give when the judge cannot point out any measure

(1) 14 C. B. 595; 23 L. J. (C.P.) 148.
(2) 1 B. & Ad. 415.
(3) 14 C. B. at p. 605; 23 L. J. (C.P.) at p. 151. 18 Jur 537

(1) 5 C 18 Jur 536

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by which they are to be assessed, except the opinion and judgment of a reasonable man. Thirdly, special damages are given in respect of any consequences reasonably or probably arising from the breach complained of. The test has been put in another form, namely, that they must be such as a court or jury may reasonably consider to be those which the parties would certainly contemplate. I do not believe that to be the true test; for those who make contracts mean to fulfil them; it is therefore idle to enter into the consideration of what will happen if the contract is broken. And to refer to the present case, I imagine that if, on making the contract, the plaintiffs had asked the bank to consider what would be the consequence if they failed to pay the bills, the bank would have declined to entertain the question altogether; but if they had entertained it, they would probably have said, "In that event there are plenty of people in Liverpool, such as Messrs. Marriott & Co., who will be willing to accommodate you;" in truth, they would have contemplated that the plaintiffs would do as they have in fact done. The case then is, that the plaintiffs having put the bank in funds to meet their drafts, the bank fail to do so, and thereupon in effect empower the plaintiffs to take such steps as are reasonable and necessary under the circumstances; and I cannot conceive a more reasonable and proper course than that which they have in fact pursued. If, then, any judge had directed the jury to give none but nominal damages (and the defendants must contend that to do otherwise would be misdirection), he would, in my opinion, have grossly misdirected them. The damages were, in my judgment, the reasonable and natural consequence of the defendants' breach of contract.

PIGOTT, B. I am of the same opinion. The rule is that, as between debtor and creditor, the creditor cannot recover more than the sum due and interest. But this is not an action of that nature, but is an action on a special contract, in pursuance of which the bills, which were three months' bills, were covered by the plaintiffs two months before they arrived at maturity. The defendants' bank was, nevertheless, by reason of its having stopped payment, unable to pay the bills, and the question is, what damages the plaintiffs can recover in an action for this breach of contract. I agree with

the case of *Hadley* v. *Baxendale* (1), so far as the principle there laid down can be applied to cases infinite in variety; but the question occurs in each case how far does it apply. Now, as my Brother Martin has said, what would necessarily have happened in the event of dishonour, considered as a contingency, was that which happened in the actual case; namely, that either the bills must have gone back to Alexandria with the ensuing result of the cost of re-exchange, or else that the plaintiffs must have raised money to meet them in the manner they have done. Was not, therefore, the expense incurred in raising the money a natural and proximate consequence of the defendants' breach of contract? It appears to me that it was, and I regard it as special damage, for the damages appear to me to be measured by the $2\frac{1}{2}$ per cent. which the plaintiffs paid, and the other actual expenses they incurred.

Rule discharged.

Attorneys for plaintiffs: *Field, Roscoe, & Co., for Lowndes & Co., Liverpool.*

Attorneys for defendants: *Allen & Co., for Simpson & North, Liverpool.*

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

1870
Feb. 8.

[IN THE EXCHEQUER CHAMBER.]

IN THE MATTER OF DE LANCEY'S SUCCESSION.

Legacy Duty Act (36 *Geo.* 3, *c.* 52)—*Money to be laid out in Land—Conversion.*

A testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C. (his eldest son) for life, remainder to C.'s first and other sons in tail male, remainder to J. (his second son) for life, remainder to J.'s first and other sons in tail male; remainder to his own right heirs.

C. and J. died without issue and intestate, and at the death of the survivor, S., a daughter of the testator, and his only other child, became entitled to the fund as heir at law of the testator, as well as of C. and J. The fund was never invested, and remained money at the death of S. No act had been done by any one amounting to an election to treat the fund either as money or as land, and E., a grandson of a brother of the testator, took the fund as heir at law.

Held (affirming the decision of the Court of Exchequer), that duty was payable by E. under the Legacy Duty Act (36 Geo. 3, c. 52).

APPEAL by the Commissioners of Inland Revenue against the judgment of the Court of Exchequer, on a petition of appeal against their assessment, presented by Edward Floyd de Lancey, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50. (1)

James de Lancey, by his will dated the 15th of November, 1790, bequeathed to trustees a fund, on trust, to lay out the same in the purchase of land, and to convey such land in strict settlement to the use of his eldest son Charles Stephen de Lancey for life, with remainders in tail male to the first and other sons of Charles Stephen, remainder to the use of the testator's son James for life, with remainders in tail male to the first and other sons of James; remainder to his own right heirs.

The testator died on the 8th of April, 1800, leaving three children, Charles Stephen, James, and Susan. The fund was never laid out in land, but Charles Stephen and James successively received the dividends till the death of the latter in May, 1857. Both sons having died bachelors and intestate, Susan became the only lineal descendant and heir at law of the testator. She died single and intestate, in April, 1866, having refused during her lifetime to receive any part either of the dividends or principal of the

(1) Law Rep. 4 Ex. 345.

fund. The fund, with the accumulated dividends, was afterwards paid into the Court of Chancery in an administration suit, and by an order of the Lords Justices the dividends accrued during the lifetime of Susan were directed to be paid to her personal representatives, and the residue of the fund to the petitioner, who was a grandson of a brother of the testator and heir at law of Susan, of her brothers, and of the testator.

It was admitted that none of the persons who would for the time being have been entitled to any real estate of which the testator had died intestate, did, while so entitled, any act with reference to the fund which might amount to, or have the effect of, an election to take the fund, or any part thereof, as money or as land, or which might have the effect of constituting such person or persons a new root or new roots of descent with regard to the fund or any part thereof.

The Inland Revenue Commissioners assessed the petitioner to succession duty on the fund at the rate of 5 per cent., as on a succession derived from Susan as his "predecessor" (16 & 17 Vict. c. 51, ss. 2, 10 and 30). The petitioner appealed on two grounds: —1. That legacy and not succession duty was payable by him in respect of the real estate fund; and that such duty was payable by him as a descendant of the brother of the testator under 36 Geo. 3, c. 52 (1); or, 2ndly, that if succession duty was payable,

(1) 36 Geo. 3, c. 52, s. 2:—"Upon every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or more, given by any will or testamentary instrument of any person who shall die after the passing of this Act, out of the personal estate of the person so dying, and also upon the clear residue, and upon every part of the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear value of 100*l.* or upwards, which shall remain after deducting debts, funeral expenses, and other charges, and specific and pecuniary legacies (if any), whether the title to such residue, or to any part thereof, shall accrue by virtue of any testamentary disposition, or upon intestacy, there shall be raised" the duties following, amongst others, "where any such legacy, or any residue, or part of residue, of any such personal estate, shall be given or shall pass to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, there shall be charged a duty of 2*l.* per cent;" altered by 55 Geo. 3, s. 184, sched. part 3, to 2½ per cent. with respect to the relatives of persons dying before the 5th of April, 1805.

By s. 7, "Any gift by any will or testamentary instrument of any person dying after the passing of this Act,

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the proper rate was 3 not 5 per cent., inasmuch as the real estate fund was a succession derived from the testator as predecessor; and the petitioner prayed that the assessment might be altered, so far as the same made him liable to a duty of 5 per cent.

C. Hutton (*Sir R. P. Collier, A. G.*, with him), for the commissioners. The fund in question is not a legacy given by the will of James de Lancey, for it cannot, in the words of s. 7 of 36 Geo. 3, c. 52, "by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying." The effect of the will was exhausted when the ultimate remainder first vested, and those who have taken since have done so successively as heirs. Neither is this personal estate passing by intestacy, for it is not personal estate at all. Equity has converted the money into land, and no act has been done by any of the parties to change its character back to money. It did not therefore pass as personal estate to the next of kin of Susan, but as real estate to her heir, the petitioner.

[BOVILL, C.J. Equity does not alter the character of the property, but the nature of the title to it.

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which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act."

By s. 19, "Any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate (ss. 12–15), unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied to such purchase."

LUSH, J. How can it be said that the petitioner does not take by virtue of the will? It is merely to give effect to the will that equity treats the money as land, and but for the will the property would have gone to the next of kin of Susan, and not to her heir at law.]

The 19th section deals with money to be laid out in land, which would otherwise not have been taxable under the Act; and the present case cannot be brought under that section. The land was to be enjoyed by several persons in succession, and ultimately came to a person entitled to an estate of inheritance in possession in the lands to be purchased; but it did not so come to the petitioner, nor to Susan, as s. 19 requires, "by virtue of any bequest" (see s. 7); it was not therefore within that section, and could not have been taxed under the Act. It was to meet such a case that s. 30 of the Succession Duty Act (16 & 17 Vict. c. 51) was inserted.

Sir J. Karslake, Q.C. (*Townsend* with him), for the petitioner. The will was still in operation at the time of Susan's death, and the trustees still held the fund upon the trusts contained in it. It was therefore a legacy within s. 7 and s. 2 of 36 Geo. 3, c. 52; or at least it would have been but for s. 19, which was inserted for the very purpose of meeting the case of money so laid out in land, and by which the legislature, being aware of the doctrine of equity with respect to conversion, has provided against its application with respect to the revenue. It is contended that this section ceases to apply when the fund is once "at home," that is, when it has reached a person who, having an absolute interest in it, would be entitled to take it in specie; but, as is pointed out by the Lord Chief Baron in the Court below (1), to limit the section in this manner is to introduce words not found in it.

C. Hutton, in reply.

BOVILL, C.J. There is no dispute that if this property is not liable to legacy duty it is liable to succession duty (16 & 17 Vict. c. 51, s. 18), and vice versâ; but if it was in fact liable to legacy duty, then, having been assessed by the Crown to succession duty,

(1) Law Rep. 4 Ex. at pp. 357–8.

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it has been wrongly assessed. My opinion is that the assessment cannot be maintained, and that this appeal must be dismissed.

The fund in question is a fund still existing as personal property in the hands of the trustees of the testator's will. It was personalty at the time of the testator's death, it has continued so from that time to the present, and at the date at which it is alleged that duty was payable it was still personalty in the hands of the trustees nominated by the will. The argument on the part of the Crown has proceeded on the ground that, by reason of the will, and of the trusts still continuing, the money is to be treated as land for all purposes, including liability to duty, and that therefore succession duty attaches upon it as land. But that argument has pressed the equitable doctrine on which it proceeds beyond its legitimate limit. When it is said that according to that doctrine a fund to be laid out in land is treated as land for all purposes, and that in the phraseology of the courts it, in fact, is land, the language so employed is figurative and metaphorical. This is very clearly stated by Lord Langdale in *Matson* v. *Swift* (1), decided in 1845, and which is the more important, as the case arose on a question as to whether probate duty was or was not payable. The case was the reverse of the present; the testator had conveyed real estate on trust for sale for the payment of debts, with an ultimate trust of the residue for his personal representatives, "notwithstanding the trust estate or any part thereof should or might remain unconverted at the time of his decease." The trusts were not carried out in his lifetime; the trust estate remained unconverted at his death, but the trustees afterwards sold a part and contracted to sell the remainder, and the Crown claimed probate duty on the clear residue, after payment of the debts and of the costs of executing the trusts, on the footing that what was directed to be done was to be treated as being already done.

Lord Langdale there explained the principle on which equity proceeds, and the sense in which the words are used when a fund is said to be converted out and out. His Lordship says (at p. 374): "A conveyance by the owner of real estate on trust to sell it for a particular purpose, or the payment of debts, with

(1) 8 Beav. 368.

a direction to pay any surplus of the purchase-money to the owner, his executors, administrators, and assigns, may have, and often has, the effect of inducing the Court to apply to the property, in whatever state it may be found, the rules of distribution which are commonly applicable to personal estate only. In the cases where this is done, the owner is, in figurative language, said to have impressed upon his real estate the character of personalty, or to have converted out and out the realty into personalty." He proceeds to explain this language, by saying: "What is meant is, that for the purposes plainly contemplated by the owner, or necessary for the accomplishment of his apparent intention, and to give effect to the rights he expressly or by implication meant to confer, the Court will declare or impute trusts, and under the execution of such trusts will distribute the property as if it were personalty." Again, he says (at p. 376): "That expression (conversion out and out) is strictly applicable to a conversion which the Court has jurisdiction to make and will make, only by enforcing equities and executing trusts, which it declares or imputes for the purpose of carrying into effect the intentions, expressed or implied, of the owner of the land. In the cases supposed the real estate is not, in fact, altered at the time of the owner's death, and equity considers not what might have been done, but what ought to be done, and will declare or act upon the trusts which are required for the purpose of making the actual conversion, at the instance only of those who shew themselves entitled to the benefit of such trusts. And we may reasonably ask the question whether, after a conveyance of land in trust to sell, or after valid contracts for the sale of land and the death of the legal owner, the Crown can be entitled, for its own purposes only, to enforce the equities between the parties? If the parties should release each other, could the Crown, for purposes merely fiscal, not in the contemplation of any party, and not required to fulfil the intention of any party, be entitled to the benefit of trusts, which are declared or acted upon only for the purpose of giving effect to the intentions of the parties?"

His Lordship accordingly held that in that case probate duty was not payable. That having been decided in Chancery, the question afterwards arose in the Court of Exchequer in *Attorney*

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General v. *Brunning* (1), as to the effect of a contract by a deceased person to sell real estate, and where the Crown sought to enforce its claim to probate duty on the purchase-money. The Court of Exchequer concurred with the view of Lord Langdale, and held that probable duty was not payable; and although their judgment was reversed on appeal (2), the opinions expressed in the House of Lords on the reversal did not interfere with the doctrine for which I now cite the case. The ground on which the decision was overruled was, that, the testator had sold his land by a binding contract, which contract was in fact carried out, and the purchase-money actually paid over to the executor, who was entitled to receive and did receive it as executor and under the probate as part of the personal estate of the deceased. But Lord Cranworth expressly says (at p. 260), "The cases relied on before Lord Langdale and Sir James Wigram, are clearly distinguishable from the present case. In *Matson* v. *Swift* (3), before Lord Langdale, the estate remained real estate at the death of the testator, and was only convertible into personalty by virtue of his direction; a direction, it is true, declared not by his will but by a previous deed, but which he might have revoked or varied by his will if he had thought fit. And the conversion into personalty, therefore, may truly be treated as having depended on his will. In *Custance* v. *Bradshaw* (4) Sir James Wigram proceeded on the same ground, namely, that at the death of the testator the property in question was real estate, and that if it was ever to lose that quality, it would be by some act to be done after the testator's death, and which might never become necessary." The case, therefore, as decided both in the Court below and in the House of Lords, is an additional authority for saying that the argument on behalf of the Crown has carried the doctrine of Chancery to much too great a length. Indeed, the true limitation of the principle is stated so clearly by Lord Langdale and is in itself so reasonable, that I cannot suppose any court would interfere with it. Lord Cranworth's observations support it and apply exactly to the present case, for the personalty has here never been converted into land, it has always remained in the hands of the trustees as money, though clothed with a trust for

(1) 4 H. & N. 94, see p. 109; 28 L. J. (Ex.) 125.
(2) 8 H. L. C. 243; 30 L. J. (Ex.) 379.
(3) 8 Beav. 368.
(4) 4 Hare, 315.

6 Jur. N.S. 1083.
(a) L. P. 6 Jur. N.S. 1085

investment in land; but the conversion has never become necessary, and it was ultimately paid over as money.

On the question, then, whether the Legacy Duty Act imposed on a fund of this description any liability to legacy duty, it would have been very difficult, even if s. 19 had not been inserted, for this property to have escaped payment. The purpose of the Act was to impose the duty on personal property, whether taken as a legacy or passing by way of intestacy, and s. 2 in terms imposes the duty upon all personalty acquired in either of these ways. But the 19th section describes what is to be dealt with as personal property; those who framed the Act, being familiar with the doctrine of the Court of Chancery, thought it right to introduce special provisions, in order to prevent the possibility of its application so as to exempt funds of this nature from taxation, and the effect is to fix upon them the character of personal property. The first part of the 19th section is most general, and refers to any sum of money directed to be laid out in land. It is said, however, that the trusts of the will which so directed it are exhausted, and that it was no longer money directed to be laid out in land. But how can that be maintained, when the trustees held the fund under the will and on the trusts which it contains, and when the Court of Chancery was asked to decide, and did decide, the rights of the parties on the ground that the fund remained money clothed with the trust which was originally created by the will? The Crown also is now claiming to treat the property as land, and to charge it with succession duty, on the ground that the trusts did continue.

The succeeding portion of the section refers to different persons, taking in succession, under the will. That clause applied to Charles, James, and Susan, who so took. The proviso, though in form a proviso, does not limit, but rather (if anything but declaratory) enlarges the liability; certainly it does not restrict it. Who are the persons who, if the money were laid out in land, would be "entitled to an estate of inheritance in possession in the real estate to be purchased," and who are to be charged as if they had become entitled to it as personal estate, "by virtue of any bequest thereof as such"? Those very persons who have, in fact, become entitled to and possessed of this fund, and who have

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become so entitled and possessed by reason of the trusts of the will. The case is, therefore, within the very words, as well as within the spirit of the Legacy Duty Act.

Some attempt was made to say that the words "by virtue of any bequest thereof" limited the operation of the section to the case of a fund which passes by virtue of a gift in the will, and that it did not extend to property which passed by descent. But plainly those words are part of a separate sentence; they have no application to the earlier part of the section, but belong to the words immediately preceding, which must be read with them; those who become entitled to an estate of inheritance in possession are to pay such duty as would be paid by them "if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such." This being my view of s. 19, and of the operation in general of the Act of 36 Geo. 3, c. 52, I hold the assessment to be wrong, and am of opinion that the appeal must be dismissed.

MELLOR, J. I am of the same opinion. I have attentively perused the case of *Attorney General* v. *Brunning* (1) in the House of Lords, and find that the judgments carefully abstain from interfering with the cases decided by Lord Langdale and Vice-Chancellor Wigram, as to the effect of a direction for conversion, and put the decision on a quite intelligible ground, pointing out the error into which the Court of Exchequer had fallen, and which does not touch the general principle on which we decide this case.

MONTAGUE SMITH, LUSH, HANNEN, and BRETT, JJ., concurred.

Judgment affirmed.

Attorney for appellants: *The Solicitor of Inland Revenue.*
Attorneys for respondent: *Townsend, Lee, & Houseman.*

(1) 8 H. L. C. 243; 30 L. J. (Ex.) 379.

HART *v.* FRONTINO AND BOLIVIA SOUTH AMERICAN GOLD MINING COMPANY, LIMITED.

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Feb. 12.

Company—Estoppel—Liability of Company registering a Person as Shareholder —Certificate of Shares.

The plaintiff bought and paid for shares in the defendants' company, and received duly executed transfers and share certificates, but was not registered as holder of the shares. The seller of the shares, being afterwards compelled to pay a call upon them, demanded repayment of the plaintiff, who required to have the transfer completed by registration. The plaintiff's name was thereupon entered on the register, and he received from the company a certificate certifying that he was owner of the shares. After and on the faith of such registration, and the delivery of the certificate, he repaid to the seller the amount of the call. The defendants afterwards discovered that before the plaintiff bought the shares they had been sold by a previous owner, by a duly executed transfer, to F., and they accordingly removed the plaintiff's name from the register, and substituted F.'s name. In an action by the plaintiff against the defendants for the removal of the plaintiff's name:—

Held, that by the registration of the plaintiff, and the delivery to him of the certificate, followed by the payment by him of the call, the defendants were estopped from denying his title to the shares, and were liable to him for their value.

In re Bahia and San Francisco Ry. Co. (Law Rep. 3 Q. B. 584) followed.

SPECIAL case stated in an action brought to recover damages for the wrongful removal of the plaintiff's name from the defendants' register of members.

On the 20th of September, 1866, the plaintiff bought of Powell 200 shares in the company for 116*l*. He paid the price, and received from Powell transfers duly executed by him, and forty certificates dated the 30th of May, 1864, under the seal of the company, and signed by two directors, each of which certified that "the person named in the register of shareholders is the proprietor of five shares numbered," &c.

Powell's name was not at that time on the register, but at some time previous to December 1866 his name was placed on the register as owner of the shares, and a call was in that month made upon him in respect of them, which he paid.

On Powell's claiming indemnity from the plaintiff, the plaintiff required the transfer to be completed by registration; this was accordingly done on the 2nd of May, 1867, and the plaintiff then

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received from the company a certificate, signed by their managing director, but not under their common seal, certifying him to be holder of 200 shares therein numbered, the numbers being the numbers of the shares so bought by him of Powell. At the foot of the certificate was written:—

"Share certificates have been issued for every five shares, and are to be handed over on a transfer being made.

"This certificate, not being required when shares are transferred, is no evidence of the shares being held by the person named therein."

After and upon the faith of such registration, and the delivery of the last-mentioned certificate, the plaintiff repaid to Powell the amount of the call so paid by him.

It afterwards appeared that these shares had formerly been held by Powning, the secretary of the company, who had, on the 14th of September, 1866, sold them to Colonel Fitzgerald, and received the price, and executed a transfer to him, but Fitzgerald's name was not entered on the register. On the 15th of November, 1866, Powning absconded, and the transfer to Fitzgerald was never found by the company, nor was it known to them that any such transfer had been executed until after the registration of the plaintiff as owner of the shares.

After the absconding of Powning the books of the company were taken to an accountant, and at his office, and by the direction of some one there, entries were made in the register by one of his clerks, by which it appeared that the shares had been transferred from Powning to Harris, and from Harris to Powell, but no transfer relating to such change of ownership from Powning to Harris (who absconded with Powning) was ever found. The transfers from Harris to Powell and from Powell to the plaintiff were, however, proved.

On the application of Fitzgerald, and after an investigation of the facts, the defendants, on the 30th of January, 1868, removed the plaintiff's name from the register, and entered the name of Fitzgerald as owner of the 200 shares.

Thereupon the plaintiff brought the present action to recover the value of the shares, which were, at the last-mentioned date, of the value of 17*s.* 6*d.* each.

The question for the Court was, whether, under the circumstances, the plaintiff was entitled to recover damages from the defendants in respect of the premises.

Brown, Q.C. (*Cohen* with him), for the plaintiff. The case is governed by *In re Bahia and San Francisco Ry. Co.* (1) The only difference between the cases is, that here the certificate was not given by the company till after the shares were bought and paid for. But in consequence of the registration of the plaintiff as holder of the shares, and the delivery of the certificate, the plaintiff repaid Powell the call, which brings the present case within the authority of the case cited.

B. Cooper (*Hawkins, Q.C.*, with him), for the defendants. The case differs entirely from that cited, for there not only was the purchase completed in consequence of the delivery of the certificate, but the certificate delivered was the certificate under the seal of the company, which, by s. 31 of 25 & 26 Vict. c. 89, is evidence of the title to shares. Here, on the contrary, the certificate relied on is not a certificate within the Act; and, moreover, it is expressly stated in the certificate that it is no evidence of title, and that the true share certificates are to be handed over on a transfer being made. Those certificates the plaintiff had already received, and what they certified was that the person named on the register was owner of the shares mentioned in them. He was, therefore, referred by them to the register; and if he had examined the register, as it was his duty to do, he would have discovered that Powell's name was not there. The company have not, therefore, made any representation to him that Powell was owner of the shares. If they did so at any time, it could only be after the registration of Powell, when the shares had been long since bought and paid for; but, in fact, there was even then no such representation, since nothing can be a representation which is not brought to the knowledge of the person said to receive it; but the representation made was only that the person named on the register was owner, and owing to the plaintiff's not examining the register the representation that Powell was owner was not perfected. The company are not, therefore, estopped from denying his title. Neither can the certificate subsequently given,

(1) Law Rep. 3 Q. B. 584.

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whatever other effect it may have, estop them from denying his title, for the shares were already bought and paid for, and the only consequence of its delivery was that he repaid Powell the call. As against a purchaser from the plaintiff the case would be different, for the plaintiff being, in fact, upon the register, the share certificates would, if the register were searched, be a representation to such purchaser that the plaintiff was owner of the shares, and purchasing upon the faith of that representation he would be within the authority of *In re Bahia and San Francisco Ry. Co.* (1), but the case is wholly different with respect to the plaintiff himself.

It is assumed that the company were justified upon the evidence in substituting the name of Fitzgerald; if, however, they were not, then the plaintiff is still a shareholder, and has suffered no injury but such as may be remedied under s. 35 of 25 & 26 Vict. c. 89.

Brown, Q.C., in reply. There was no duty upon the plaintiff to search the register; it was the duty of the defendants to keep it correctly: *In re Bahia and San Francisco Ry. Co.* (2) Although the share certificates had been delivered to the plaintiff, his title was not complete till his name was entered on the register, and by the registration and the subsequent certificates the defendants represented to the plaintiff that he was owner of the shares, and on this representation he acted. They are therefore estopped from denying his title.

MARTIN, B. I am of opinion that the plaintiff is entitled to judgment. He bonâ fide bought and paid for shares in the company, and received duly executed deeds of transfer. At that time the name of Powell, the seller of the shares, was not on the register, but it was subsequently put on, and the company accepted him as a holder of these shares, and received from him payment of a call which they made upon him as such holder. The plaintiff then applies to be placed upon the register as the transferee of Powell, and, having been so entered, repays to Powell the amount of the call. The company have thus chosen to adopt

(1) Law Rep. 3 Q. B. 584.
(2) Law Rep. 3 Q. B. at pp. 592, 594, per Blackburn, J.

Powell as a shareholder, and have allowed the plaintiff to repay to Powell the amount of the call on the faith of their registration of the plaintiff as transferee from Powell, and of a certificate from them recognizing the plaintiff as holder of the shares. It would not require much, or indeed any, authority to induce me to hold that if persons conduct themselves so as to shew that another is owner of property they cannot afterwards turn round and say that the property was not his, if the representation has been acted upon. If they allow the representation to be made, and it is acted on, they are liable for the consequences.

BRAMWELL, B. I am of the same opinion. I impute no fault to the defendants, and it seems that the true title to the shares was in Fitzgerald, and not in the plaintiff. But the plaintiff has, nevertheless, as against the defendants a good title by estoppel, for he has been injured by their act. Possibly he could not have compelled them to enter his name upon the register, or, at least, Powell could not; but they had the care and custody of the register, and it was for them to say whether they should or should not enter the plaintiff's name, or Powell's. If they elect to do it, and acts are done by him in consequence, they cannot afterwards undo it. The plaintiff has a right to say: "I made you a tender of myself as shareholder, and you accepted me, and I have acted upon that acceptance." This is no novelty; as against a bonâ fide holder for value a banker paying a forged cheque, or a drawee paying a forged bill, cannot afterwards recover back the money, nor can an acceptor deny the drawer's signature. Suppose the plaintiff had sold the shares, and handed over the certificate, it is admitted that the purchaser would have had a good title by estoppel against the defendants, who could not have denied his right to compel them to enter his name. That would shew, if the defendants' contention is sound, that the plaintiff would have been better off if he had sold the shares than if he had continued a shareholder; but why should that be? Again, would he have had any answer if the defendants had made a call upon him? Clearly not. He has therefore a good title by estoppel. My only difficulty has been that the judgment in the Queen's Bench seems to rely entirely on the certificate, not on registration; but the principle is

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equally applicable here, and the case so considered is an authority for the plaintiff.

PIGOTT and CLEASBY, BB., concurred.

Judgment for the plaintiff. (1)

Attorney for plaintiff: *Solomon.*
Attorney for defendants: *W. C. Smith.*

Feb. 9.

[IN THE EXCHEQUER CHAMBER.]

WALTHEW AND ANOTHER *v.* MAVROJANI AND OTHERS.

Ship and Shipping—General Average—Expenses of Getting off Stranded Ship.

Extraordinary expenses incurred in getting off a stranded ship, after the cargo has been removed to a place of safety, are not (in the absence of exceptional circumstances) general average to which the owner of cargo is liable to contribute, although the goods remain in the control of the shipowner's agents:—

Semble (per Montague Smith and Hannen, JJ.), such expenses may, as against the owner of cargo so removed, be general average, if the goods cannot be otherwise carried forward, or only at a greater expense, or after a delay which would deteriorate the goods.

A ship laden with cargo, while still in port, was driven ashore on the 5th of October; the cargo was unshipped, and by the 19th was landed and warehoused in safety under the superintendence and control of the shipowners' agents; an attempt was then made to float the vessel, which was abandoned on the 24th of November. Subsequently a second attempt was made which, on the 31st of December, succeeded; the ship was taken into port and repaired, and, after reshipping the cargo, proceeded to its destination:—

Held, that the expenses of getting the vessel off were not general average to which the owners of cargo were bound to contribute.

ERROR upon a special case, on which the Court of Exchequer, in Trinity Term, 1867, gave judgment for the defendants.

The plaintiffs were owners of the *Southern Belle*, on which the defendants shipped at Calcutta for London a cargo of linseed. On the 5th of October, 1864, while the vessel was lying so loaded, and

(1) The question of the measure of damages was not argued, but, on the authority of *In re Bahia and San Francisco Ry. Co.* (Law Rep. 3 Q. B. 584), it was taken to be the value of the shares at the time of removal, and interest.

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safely moored in the port of Calcutta, a cyclone broke over the port and drove the ship from her moorings ashore upon a mud-bank.

From the 7th to the 19th the crew, with other hands, were engaged in partly dismantling the ship, and discharging her cargo and ballast: and before the 19th the whole of the cargo was safely warehoused in Calcutta, under the superintendence and control of the agents of the shipowners. The ship was so dismantled and lightened in pursuance of the advice of surveyors, it being in their opinion otherwise impossible to remove her from the position in which she lay.

On the 19th of October a surveyor examined the ship, and advised that she would not float without extraordinary means being employed to get her off the strand. Tenders having been invited, a firm at Calcutta contracted with the plaintiffs' agents to float the ship; but on the 24th of November, their efforts having proved unavailing, they declared their inability to perform their contract, and abandoned the attempt. The plaintiffs' agents then made a fresh contract for 2300*l.* with Messrs. Burns & Co., to float the ship; and they, by constructing an embankment round the vessel, so as to form a dock, which they afterwards filled with water, succeeded on the 31st of December in floating her.

The vessel was repaired at Calcutta, and on the 22nd of March the defendants' cargo, which had remained at Calcutta in the possession of the plaintiffs' agents, was reshipped on board of her, and was then conveyed to London, and safely delivered to the defendants there.

The plaintiffs contended that the 2300*l.* paid to Messrs. Burns & Co. was general average, and brought this action to recover from the defendants their proportionate share. The Court of Exchequer held that the sum so paid was not general average, and gave judgment for the defendants. The plaintiffs then brought error.

Aspinall, Q.C. (*Littler*, with him), for the plaintiffs. This case must be decided in favour of or adversely to the plaintiffs, according as the Court accepts the doctrine of *Job* v. *Langton* (1) or *Moran* v. *Jones*. (2) The rule which the latter case tends to establish is the correct rule; as the present case is also more similar in its facts

(1) 6 E. & B. 779; 26 L. J. (Q.B.) 97. (2) 7 E. & B. 523; 26 L. J. (Q.B.) 187.

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to that case than to *Job* v. *Langton*. (1) The true principle is, that so long as the voyage is not abandoned, and the goods remain in the care and custody of the shipowners for the purpose of the voyage, although they may not be actually on board, the whole is one common enterprise and adventure, in which the owner of the ship and the owner of the goods are alike interested. Whatever, therefore, is done by the shipowner for the purpose of averting a risk which threatens that adventure is done for the common interest of both.

[BOVILL, C.J. That proposition would include equally repairs which are necessary for enabling the ship to complete the voyage.]

It may be difficult to distinguish such repairs from ordinary expenses, and the application of the rule may, for convenience, be limited to expenses of an extraordinary kind, which the expenses of floating a stranded vessel certainly are, and as such were allowed in *Moran* v. *Jones*. (2) The American Courts have recognized this rule, Parsons on Shipping, pp. 392 et seq. note (3), and the cases of *M'Andrews* v. *Thatcher* (4), and *Nelson* v. *Belmont* (5), there cited. In the former of these cases *Moran* v. *Jones* (2) is commented on and approved (6), and stress is laid upon the fact that there, as here, the goods, though removed from the ship, remained under the control of the master.

[BRETT, J. It has always been understood that the American courts have carried the doctrine of general average farther than the English; and that in this country, since the doctrine of *Plummer* v. *Wildman* (7), was limited and explained by the case of *Power* v. *Whitmore* (8), the rule has been construed strictly.]

[MONTAGUE SMITH, J. The American courts agree that there must be a community of peril and of benefit; the question in each case turns upon the application of the principle to the facts. (9)]

(1) 6 E. & B. 779; 26 L. J. (Q.B) 97.

(2) 7 E. & B. 523; 26 L. J. (Q.B.) 187. *Cohen* referred to the comment of Blackburn, J., on that case in *Kemp* v. *Halliday*, 6 B. & S. at pp. 747–8; 34 L. J. (Q.B.) at p. 243.

(3) The matter contained in Parsons on Shipping, vol. i. pp. 390–6, is reprinted from Parsons on Mar. Ins. vol. ii. pp. 263–9.

(4) 3 Wallace R. 347.

(5) 21 New York R. 36.

(6) 3 Wallace R. at pp. 376–7.

(7) 3 M. & S. 482.

(8) 4 M. & S. 141.

(9) Parsons on Marine Ins. vol. ii. p. 263 (the same passage occurs in Parsons on Shipping, vol. i. p. 390 (1869)), says: "If the vessel be stranded not voluntarily, and expenses are incurred

All extraordinary expenses bonâ fide incurred by the master in the exercise of his discretion as agent for the ship and the cargo, and for the benefit of both, ought to be allowed as general average.

Cohen, for the defendants, was not called upon.

BOVILL, C.J. I am of opinion that the judgment of the Court below must be affirmed. There is no doubt that the expense of all repairs to the vessel rendered necessary by the ordinary perils of navigation, and which are required to enable it to prosecute the voyage and complete the adventure, must be borne by the owner. He has undertaken, subject to the usual exceptions, to carry the cargo to its destination and there deliver it, and therefore the costs of repairs are expenses incurred for the benefit of the ship alone and cannot be treated as the subject of general average. If, how-

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for getting her off, and the effort is unsuccessful, the ship alone pays for that. If the vessel be got off, then are those expenses to be contributed for? As it was the duty of the master to keep the vessel off the shore if he could, is it not as plainly his duty to get her off if he can? So, if he accidentally loses an anchor, or a sail is blown away, or a spar, or many sails and many spars, the extent of his duty, and not its character, is changed. And if the vessel is on shore, and he can get her off and carry the goods to their destination, is it not simply his duty to do so, and is not the cost of his doing it his loss? So it may be argued, and our notes will show that there is some conflict in the authorities. Perhaps it may be said, that the tendency of the American courts and of the American practice is to consider these expenses as a general average loss; whilst that of the English court is to charge them to the ship alone. Here, as in some other questions, the English courts seem to construe the duty and obligation of the owner and master more strongly against them than do the courts of this country."

Phillips Ins. s. 1312 (vol. ii. p. 84, 5th ed.) "*Under what circumstances, and to what extent, the expense of getting off an accidentally stranded ship is to be contributed for?* (After examining some foreign ordinances, he proceeds). The expense of discharging the cargo for the purpose of floating a vessel which has been accidentally stranded, and that of reloading the cargo, and the other expenses requisite to enable the vessel to proceed on the voyage, except those of making repairs, are in practice brought into general average, where the vessel, after being got off, proceeds with the same cargo. But in case the lightening of the vessel does not make her float, and other means are necessarily resorted to for this purpose, such as buoying the vessel with casks, or making a channel, the expenses incurred on the vessel after the cargo is landed are incurred for the benefit of the vessel, that she may be able to earn freight, and are not any more properly the subjects of general contribution than the repairs of the vessel."

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ever, loss or expense is occasioned by reason of some extraordinary course taken, or risk incurred, for the benefit of all concerned, then those who, by reason of their being exposed to a common danger, are interested in that course being taken or that risk incurred must contribute their share. Upon the general principle there is no dispute. But from time to time endeavours have been made to engraft exceptions upon this rule. In *Hallett* v. *Wigram* (1), an attempt was made to throw the expenses of repairs of the ship upon the owners of cargo, and upon exactly the same grounds on which it has been contended in the present case that the expenses in question should be treated as general average. In order to test the principle, the point was there raised by the defendants upon the pleadings, in an action in which the owners of the cargo sued the shipowners for the value of a portion of the cargo, sold to raise money for repairs which were rendered necessary by tempestuous weather. [After referring to the pleadings (2) his Lordship continued]:—Therefore, by the most positive and distinct allegations, the principle was there sought to be established that if the repairs are necessary for enabling the ship to carry the cargo and would not have been necessary but for that purpose,

(1) 9 C. B. 580.

(2) See 9 C. B. at p. 583. The plea alleged that in consequence of the injury and damage caused by a tempest the ship was "incapable of further prosecuting her said voyage, insomuch that it became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship with her said cargo from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, and in the performance or completion of the said voyage, that the said ship should put back and sail back as in the first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired;" and further, after stating that the port to which the ship put back was the most proper and convenient port, it alleged that the said cargo was there unloaded, and the ship repaired, "for such common benefit and advantage as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo;" that the repairs were necessary for the completion of the voyage; that the costs of the repairs greatly exceeded the value of the ship when repaired, and that "the said repairs were such as ought not to have been done to the said ship except for the purpose of conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship if the said cargo could otherwise have been conveyed to the said port of delivery."

and are in that sense done for the common benefit of both ship and cargo, the cargo must contribute. The Court, however, decided against this principle, and in delivering judgment Wilde, C.J., says (1): "It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination that the pleas shew that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent. The pleas allege that the *cargo* could not be conveyed to its port of delivery by any other ship, but it appears both from the declaration and the pleas that the cargo consisted of other goods besides those of the plaintiffs; and there is no allegation that the plaintiffs' goods might not have been forwarded by another ship, or that they were in any immediate peril. This is therefore the case of ordinary sea damage, which the shipowner must repair at his own expense. The claim for general average arises where a part of a shipper's goods is sold or destroyed for the purpose of relieving the rest from some impending peril." And again, after quoting the observations of Lord Tenterden in his work on Shipping (2), the learned Chief Justice says (3): "It seems to me that the fair import of what Lord Tenterden lays down is, to exclude from general average damage like this." In that case, therefore, the Court of Common Pleas deliberately, and upon the strongest possible allegations of fact, declined to adopt the principle now contended for. In *Job* v. *Langton* (4) a similar attempt was made to charge the owners of cargo with contribution to the expenses incurred in getting the ship off a shoal on which she had struck, those expenses being incurred after the goods had been discharged and were in a place of safety. The distinction was there raised between repairing a ship and placing her in a position in which she could be repaired (5); and it was contended that since by the agreement of the parties (although the goods were in fact transhipped) it was to be taken that the adventure was not abandoned, but that the goods were to be treated as

(1) 9 C. B. at p. 601.

(2) Abbott on Shipping, p. 497, 5th ed.

(3) 9 C. B. at p. 604.

(4) 6 E. & B. 779; 26 L. J. (Q.B.) 97.

(5) Blackburn, arguendo (6 E. & B., at p. 788): "The repairs are within the owner's obligation to keep his ship seaworthy; but expenses preliminary to the repairs are not."

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if sent forward in that vessel, and under the care and custody of the shipowner, the adventure was not complete; that there was therefore a community of peril in the adventure, and that the expenses of getting the vessel off were necessary to complete the adventure. That argument was precisely similar to the argument employed to-day, and the facts were similar; but the Court repudiated that argument on the principle that the cargo being in safety and the ship only in peril, the expenses were not "extraordinary expenses incurred for the joint benefit of ship and cargo," and that they were therefore not distinguishable from the expenses of ordinary repairs. Mr. Aspinall could only distinguish that decision from the present case by citing *Moran* v. *Jones* (1) as inconsistent with it, and asking us to decide between the two, by adopting the later decision.

Now *Moran* v. *Jones* (1) was a peculiar case. The facts were somewhat similar to those of the present case, though not so similar as those in *Job* v. *Langton* (2); but, in construing the decision, we must take not only the facts stated, but also the inference which the Court drew from them. The Court did not affect to interfere with the principle laid down in *Job* v. *Langton* (2), which was a considered judgment pronounced after an elaborate argument; on the contrary, they expressly adhered to that decision, and the whole case turned on a difference in the facts and on the inference which the Court drew from those facts. The action was against underwriters on freight, and the point was indirectly raised on what principle the adjustment was to be made, the underwriters seeking to make the cargo liable for general average. But, on looking to the facts, it appears that the only goods which were removed were, not the general cargo, but a small portion only of goods belonging to the shipowner himself. The vessel was chartered to go to the Chincha Islands, and bring home a cargo of guano; and, with the consent of the charterers, the owner shipped on his own account an outward cargo to the amount of 600*l*. In the narrative of events it is stated (3), "On the 9th the weather being more moderate, assistance was procured from Liverpool, and

(1) 7 E. & B. 523; 26 L. J. (Q.B.) 187. 2 Jur. N.S. 663.

(2) 6 E. & B. 779; 26 L. J. (Q.B.) 97. 2 Jur. N.S. 668

(3) 7 E. & B. at p. 525; 26 L. J. (Q.B.) at p. 188. 2 Jur. N.S. 663.

men employed saving the wreck from alongside and the materials of the ship, which, *with some goods belonging to the shipowner* which had been entrusted to the master, were all sent in lighters to Liverpool. . . . When the repairs were completed the vessel was again fully ballasted, the goods were re-shipped, and she again set sail on her voyage."

The only goods therefore which are stated to have been unshipped and re-shipped were those of the shipowner, and with respect to these it is stated that men were employed alongside in saving, at the same time, the materials of the ship and the goods, and that they were all sent together in lighters to Liverpool. With that statement before them the Court drew the inference that although the goods got to shore before the expenses were incurred, yet the whole was one continuous operation, and that on that principle there was no distinction created by the mere difference in point of time. Accordingly, Lord Campbell says (1), "The goods had been taken from the ship and put on board a lighter before these expenses were incurred; and, if this had been a separate operation, by which they were intended to be saved for the benefit of the owner of the goods, we should have thought, as in *Job* v. *Langton* (2), that the goods were not liable to contribute to the expenses subsequently incurred. Looking, however, to the facts stated in this special case, it seems to us that the act of putting the goods in the lighter was only part of one continuous operation, viz., getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired with a view to prosecute the original adventure. When she got to Liverpool the operation of saving her from shipwreck was completed . . . but the expenses of this continuous operation, for the common benefit of ship, goods and freight, are the subject of a general average. In *Job* v. *Langton* (2) we considered that the goods had been saved by a distinct and completed operation, and that afterwards a new operation began which could not be properly distinguished from the repairs done to the ship to enable her to pursue the voyage. . . . But in the case on which we have now to adjudicate, the goods were put into a lighter by

(1) 7 E. & B. at p. 533; 26 L. J. (Q.B.) at p. 191.

(2) 6 E. & B. 779; 26 L. J. (Q.B.) 97.

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the master of the ship along with materials of the ship saved from the wreck; and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should be undertaken and completed, by which the ship and goods should be rescued from the peril to which they were exposed, nothing might have been done, and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation, which contemplated the benefit of all the interests imperilled by the stranding."

This case, therefore, does not interfere with the decision in *Job* v. *Langton*. (1) But if Mr. Aspinall were right and there were an inconsistency, I should be prepared to abide by the latter case. In America, no doubt, there is a different application of the rule, but this is not now observed for the first time, the difference has been long known and recognized. The American courts have enlarged the limit of general average, and have included within the description of extraordinary expenses incurred for the common benefit, the expenses of repairs rendered necessary by extraordinary perils, and made at an intermediate port for the purpose of prosecuting the voyage (2), and have in some other respects deviated from what we consider the strict rule. But the English courts have held strictly that unless there be a common risk, and a voluntary sacrifice or an extraordinary expenditure incurred for the joint benefit of ship and cargo, a claim to general average is not established.

Now to apply this principle to the present case. It is here stated that the ship having been driven ashore in the cyclone of the 5th of October, the cargo was landed and was safe on shore by the 19th, but that the ship was then still on the bank, exposed to grave peril. The goods being then safe, what difference would it have made to their owners if the ship had been overwhelmed by the sea, and sunk? After this an effort was made to get the ship off, which

(1) 6 E. & B. 779; 26 L. J. (Q.B.) 97.

(2) Phill. Ins. s. 1300; Parsons on Shipping, vol. i. p. 391.

proved abortive; then another and successful attempt was made, and it is in respect of the expense incurred in this last attempt that the plaintiffs make this claim of general average. But, when those expenses were incurred, the goods had already ceased to be connected with the ship, except in so far as that if the ship were got off she would be able to carry on the goods to England; and it is not shewn that any advantage resulted to the owners of the goods from their being carried on in that ship rather than in any other; and if general average were claimed on that footing it would have to be assessed on altogether a different scale from that of the value of the goods. No claim of that kind is however made. In short, whereas to ground a claim for general average, there must be a danger actual or impending, common to both ship and cargo, here the cargo was safe and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made, or extraordinary expense incurred, to save both ship and cargo, or for the common benefit of both.

The claim has been put on the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out. But that argument is in direct contradiction to the principle laid down with respect to repairs, which are equally necessary to enable the ship to complete the adventure, but which are not matters for general average; and, independently of authority, it also fails to shew any common peril, or any sacrifice made to secure a common benefit. That the argument does so fail, and that general average does not depend on whether the adventure can or cannot be carried out, is abundantly shewn by the cases to which I have already referred. The judgment below must therefore be affirmed.

MELLOR, J., concurred.

MONTAGUE SMITH, J. I only wish to add, that I think there may be cases where, though the goods are landed and so far in safety, yet the adventure of the owner of the goods may still be in peril, as in the case of perishable goods landed on a desert island in a distant and unfrequented part of the world. But here, not only were the goods landed, but I draw the inference that it was indifferent to the owner whether they went forward to England

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in the *Southern Belle,* or in any other ship. Therefore, no part of his adventure was in peril, and he cannot be made liable to general average.

LUSH, J., concurred.

HANNEN, J. Upon this case we are obliged to choose between the English and the American doctrine, and I elect the English. The proposition that general average includes all extraordinary expenses incurred for the purpose of continuing the voyage, is not warranted by the principle which governs contribution to general average. That principle is that it is unjust that expenses incurred by the owner of the ship for the benefit of all should be borne by him alone. But the expenses in question were not such; for it is indifferent to the owner of goods whether his goods are taken on by the same ship, except where they would not otherwise be carried on at all, or only at a greater expense. In such a case it may be that the owner of cargo would be liable to general average, though this is merely an expression of opinion; but, ordinarily, expenses incurred subsequently to the removal of the goods can only be incurred to save the ship, and are not for the benefit of the cargo. I therefore think that the English doctrine is the true doctrine, and that only expenses which are incurred in the preservation of ship and cargo from a common danger are included in general average. Here I find as a fact that all common danger was at an end when the cargo was on shore, and that the owner of the cargo is therefore not liable to contribute.

BRETT, J. It is not necessary to decide that the dividing line is the moment when the goods are parted from the ship. I think the judgment should be affirmed on the simple ground that, at the time when the expenses were incurred, the goods were in safety, and that, according to the English rule, such expenses are not general average. The owner of goods is not bound to contribute to expenses which are incurred solely for the benefit of others.

Judgment affirmed.

Attorneys for plaintiffs: *Wright & Venn.*
Attorneys for defendants: *Field, Roscoe, & Co.*

THE DUKE OF NORTHUMBERLAND *v.* HOUGHTON AND OTHERS. 1870 Jan. 26.

Fishery—Royal Franchise—Prerogative—Merger—Warren—Wreck.

The plaintiff claimed a several fishery in the river Tyne, which he proved to have existed from time immemorial, and, therefore, to have had a legal origin, having been originally granted by the Crown before Magna Charta to the prior and monks of a monastery. The defendants proved that, after Magna Charta, the original grantees had forfeited their "liberties and free usages," and contended that under these words a several fishery was included; and that the several fishery having been thus forfeited, had merged and could not be re-granted by the Crown:—

Held, that the plaintiff was entitled to judgment.

Per Kelly, C.B., and Pigott, B. The words "liberties and free usages" do not include such a franchise as a several fishery, and the question of merger therefore does not arise, there having been no forfeiture:—

Semble, if there had been a forfeiture, there would have been no merger.

Per Martin, B. A several fishery does not merge upon its being resumed by the Crown, either by reason of forfeiture or otherwise.

SPECIAL case, raising the question whether, under the circumstances therein stated, the plaintiff had a sufficient title to a several salmon fishery in the river Tyne, in the county of Northumberland, to enable him to maintain an action of trespass against the defendants for breaking and entering the same, and catching and disturbing the fish there.

The case contained a large amount of evidence which pointed to the conclusion that the several fishery claimed had existed from time immemorial, and therefore had a legal origin, having been created by the Crown before the passing of Magna Charta. There was also strong evidence of continuous modern user for upwards of 100 years. The original grantees were the prior and monks of the monastery of Tynemouth; that monastery, which was of a greater yearly value than 200*l.*, was dissolved in the 30th year of Henry VIII., and all the possessions and estates and rights of the prior and monks were vested in the Crown. In the reign of James I. they were re-granted to the plaintiff's ancestor.

It was found by the case that in the reign of Edward I., the king, by his charter, dated A.D. 1299, in the twenty-seventh year of his reign, after reciting that certain "liberties and free usages" claimed by the Prior of Tynemouth and his predecessors, by virtue

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of their charters, had been adjudged by the King's Court to have been forfeited, and were seized into the king's hands, did for himself and his heirs restore and yield up all the aforesaid liberties and free usages to the prior and monks, to have and to hold to them and their successors for ever, as fully as well in land and water as in other places, as they had and held the same by virtue of their charters before the seizure. This charter was relied on, on the part of the defendants, as shewing that since Magna Charta the several fishery as a "liberty or free usage," belonging to the monastery, had been forfeited to the Crown, and assuming that to have been so, they insisted that the fishery was merged and could not be re-granted.

It was also at first contended that by reason of the dissolution of the monasteries and the consequent reverter to the Crown of all the lands and property belonging to them, the several fishery in question, which thus became the property of the Crown, was merged; but this part of the argument was not pressed by the defendants' counsel, who appeared to concede that 32 Hen. 8, c. 20, contained words capable of preventing a merger of the fishery. (1)

Jan. 24, 26. *Mellish, Q.C.* (*Manisty, Q.C.*, and *Pinder* with him), for the plaintiff. The evidence that the several fishery had a legal origin, is conclusive, and the only mode of meeting it is by contending that its having reverted to the Crown before the charter of Edward I., or on the dissolution of the monasteries, caused it to merge. But there is no merger in the case of such a franchise as a several fishery which is not held by the Crown by virtue of the prerogative—as felon's goods, for example, are held. Such a franchise is analogous to a warren, or market, which do not merge by reverting to the Crown; *Case of the Abbot of Strata Mercella* (2); Comyn's Digest., tit. Franchises, G. 1.

Moreover, the forfeiture of "liberties and usages" is no evidence that the several fishery was forfeited, and the question of merger, therefore, does not arise.

(1) It would seem doubtful if the provisions of 32 Hen. 8, c. 20, had any application to the case, as they appear limited to monasteries under the yearly value of 200*l*.

(2) 9 Rep. 24.

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Pickering, Q.C. (*G. Bruce* with him), for the defendants. The words "liberties and free usages" are sufficient to include a several fishery, and the fishery claimed by the plaintiff did, therefore, revert to the Crown at a time subsequent to Magna Charta. That being so, it was merged: Hale, De Portibus Maris, part 2; Hale, De Jure Maris, c. 4: Co. Inst., vol. iv. p. 300. Nor, regarding the matter at common law, did the Crown suffer any loss; for the next hour after it had resumed possession of a several fishery it could re-create it, even in private waters, where the soil belonged to a subject: Brooke's Abr. tit. Quo Warranto, pl. 11; Hale, De Jure Maris, c. 2. By Magna Charta, it is true, that power was lost; but a statutory disability imposed on the Crown cannot alter the common law of merger. This franchise is not analogous to a warren: *Rogers* v. *Allen* (1), where Heath, J., points out the distinction. The *Case of the Abbot of Strata Mercella* (2), is distinguishable. It was decided on the words of 32 Hen. 8, c. 20, which may possibly keep alive in the Crown, as property apart from the prerogative, more liberties, &c., than at common law could be preserved. But supposing the judgment there given to be applicable, a fishery cannot be counted as similar to a fair or a warren. It is rather analogous to such franchises as wreck of the sea, which, according to the same authority, are merged when they revert.

Mellish, Q.C., in reply. The rule of merger operates for the Crown's advantage, but here, if applied as suggested, would work its disadvantage, even apart from Magna Charta. For if, in the interval between the first grant of the fishery and its being resumed in consequence of forfeiture or otherwise, the Crown had parted with the land over which the water, the subject of the fishery, flowed, it could not re-create the fishery to the injury of the private owner. Such a right never was applicable to private waters: *Case of the Bann Fishery* (3); *Duke of Somerset* v. *Fogwell.* (4)

[PIGOTT, B. The new grantee would take subject to the rights of the person who had become owner of the soil, just as the grantee of the rights of the Crown in a navigable river

(1) 1 Camp. 310, 313.
(2) 9 Rep. 24.
(3) Davis, 55, a.
(4) 5 B. & C. 875.

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takes subject to the rights of the public: *Mayor of Colchester* v. *Brooke.* (1)]

That is so; but there has been no merger here, for a several fishery has been held to be exactly analogous to free warren: *Heddy* v. *Wheelhouse.* (2)

KELLY, C.B. [after reviewing the evidence of the fishery having had its origin before Magna Charta, and stating his opinion that that circumstance was amply and satisfactorily proved, proceeded]:—It is contended, however, that a several fishery belongs to the Crown by virtue of its prerogative, and that if after the passing of Magna Charta it is forfeited, it becomes merged in the prerogative and is extinguished, so that the Crown is incapable of regranting it. Now, before I could accede to such a proposition, I should certainly desire time for consideration; but upon the evidence I do not think there is enough to show that there ever was in fact a forfeiture of this fishery. The charter of Edward I., relied on by the defendants, simply recites that certain "liberties and free usages" had been forfeited, and these words do not seem to me sufficient to include a several fishery. No decision, therefore, on the point raised by the defendants is in my judgment necessary. At the same time, without wishing to pronounce anything like a final opinion on the matter, I may say that I am under a strong impression that the defendants' contention is untenable. Several fisheries appear to me to range rather with fairs, markets, or warrens, which, when they revert to the king, do not merge, than with wreck of the sea, felons' goods, or estrays, which, being originally part of his privileges jure coronae, are merged in his royal prerogative, if they come again to him after having been appendant to other possessions, so that he has them again jure coronae. The plaintiff is, therefore, entitled to our judgment.

MARTIN, B. I am of the same opinion; the plaintiff made out a very strong primâ facie case upon the evidence [to which the learned Judge referred in detail], but the defendants seek to meet it by contending that there is evidence that the fishery was forfeited to the Crown at a later period than Magna Charta, and that

(1) 7 Q. B. 339. (2) Cro. Eliz. 591.

having thus reached the hands of the Crown again it was merged, and could not be re-granted. Now, assuming that the evidence makes out in fact the defendants' proposition, in my judgment their argument, which has been ably and candidly laid before the Court, has no foundation in law. The case seems to me to be really concluded by that of the *Abbot of Strata Mercella* (1), and by *Heddy* v. *Wheelhouse.* (2) In the former of these two cases, Lord Coke expressly deals with the question raised here, and lays down the rules by which it may be determined what liberties merged when they reverted to the Crown, and what did not. He first refers to the intention of 32 Henry 8, c. 20, which was, he says, to advance the possessions of the dissolved monasteries, as well in valuation as estimation, and to revive such franchises, &c., as the late owners of the abbies had; and then he proceeds thus: "It is [therefore] to be considered what privileges, liberties, franchises, and jurisdictions were extinct in the Crown, by the accession of the said possessions to it. And as to that it is to be known that when the king grants any privileges, liberties, franchises, &c., in his own hands, as parcel of the flowers of his crown, as bona et catalla felonum . . . bona et catalla waviata . . . wreccum maris, &c., within such possessions, there if they come again to the king they are merged in the Crown, and he has them again in jure coronae; and if the wreck or goods waifed, estrays, &c., were appendant before to possessions, now the appendancy is extinct, and the king is seised of them in jure coronae. But when a privilege, liberty, franchise, or jurisdiction was at the beginning erected and created by the king, and was not any such flower before in the garland of the Crown, then by the accession of them again to the Crown they are not extinct, nor the appendancy of them severed from the possessions; as if a fair, market, hundred, leet, park, warren, et similia are appendant to manors, or in gross, and afterwards they come back to the king, they remain as they were before in esse, not merged in the Crown, for they were at first created and newly erected by the king, and were not in esse before, and time and usage has made them appendant, which difference was agreed per totam curiam." Now, I think, a several fishery is similar, not to the first, but to the second class of franchises

(1) 9 Rep. 24. (2) Cro. Eliz. 591.

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enumerated by Lord Coke. It appears to me to be precisely analogous to a warren, and that being so, I think the present case comes directly within the authority I have cited.

PIGOTT, B. [after referring to the evidence and expressing his assent to the conclusion come to by Kelly, C.B., and Martin, B., proceeded]:—With regard to the question of merger, upon which the defendants' counsel has addressed the Court with so much ability, I am unable to assent to his argument. I think there is no satisfactory evidence of this fishery ever having been forfeited. But if there had been such evidence, I should be of opinion, although it is not necessary now to decide the point absolutely, that the fishery would not be merged upon its reverting to the Crown, but would remain as distinct and separate property, capable of being re-granted. Such a right as a fishery is, did not grow out of the prerogative originally, and cannot be held to merge in that out of which it did not grow. It is a right in no sense analogous to waifs or wreck of the sea, which are described as "flowers in the garland of the Crown," but rather to a warren for example, which, it is admitted, would not be extinguished upon coming back into the hands of the Crown.

Judgment for the plaintiff.

Attorneys for plaintiff: *Bell & Stewards.*
Attorneys for defendants: *Tinley & Adamson.*

Feb. 16.

MOULE *v.* GARRETT AND OTHERS.

Assignment of Lease—Liability of ultimate Assignee to Lessee for Breach of Covenant — Privity—Implied Contract—Principal and Surety—Effect of express Covenants to indemnify between Assignor and immediate Assignee.

There is an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenants in the lease committed by each assignee during the continuance of his own term; and such promise will be implied, although each assignee expressly covenants to indemnify his immediate assignor against all subsequent breaches.

The plaintiff was lessee of certain premises under a lease containing a covenant to keep in repair. He assigned his interest to B., who assigned it to the defendants. The assignments from the plaintiff to B., and from B. to the defendants,

contained express covenants in each case to indemnify the immediate assignors against all subsequent breaches. Whilst the defendants were in possession they committed breaches of the covenant to keep in repair contained in the original lease, in respect of which the lessor recovered damages from the plaintiff. In an action to recover over these damages against the defendants:—

Held (by Channell and Pigott, BB., Cleasby, B., dissenting), that the plaintiff was entitled to recover.

DECLARATION, that one G. Thurgood demised by deed, dated the 15th of June, 1845, to the plaintiff certain premises for a certain term at a rent of 69*l.* per annum, and the plaintiff thereby covenanted, amongst other things, that he, his heirs and assigns, should from time to time during the said term pay rent, and well and sufficiently repair and keep, &c., the said premises; that afterwards, and after the plaintiff had entered into possession, it was agreed, on the 3rd of May, 1860, between the plaintiff and the defendants, that he should sell and they should buy the residue of the term, the plaintiff to give up possession on the 9th of May next ensuing; that the plaintiff gave up possession, and the defendants entered upon the premises, and became the assignees of the term, and subject to the performance of the covenants in the lease contained, and it thereupon became their duty as such assignees in possession to perform the said covenants; yet the defendants, in breach of their duty, did not pay the rent, and did not repair, &c., according to the terms of the lease; and that by reason thereof the executors of G. Thurgood (he having died) obtained judgment against the plaintiff for the said breaches for a large sum which the plaintiff was compelled to pay with costs, and also incurred costs in defending the action. [There were also the common counts for use and occupation, money paid, &c.]

Pleas: 1. Not guilty. 2. Traverse of the deed alleged to have been made between G. Thurgood and the plaintiff. 3. That it was not agreed between the plaintiff and defendants, nor did the plaintiff give up possession of nor did the defendants enter on the premises, nor did they become, nor were they, assignees of the alleged lease, or subject to the payment of the rent, or the observance of the covenants, nor were they possessed as such assignees, nor was there any such duty on them as assignees as alleged.

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4. That before the alleged breaches the defendants assigned all their estate and interest in the unexpired residue of the term to one T. Higgins, who then entered upon and was possessed of the premises for the residue of the term.

Issue, and as to the fourth plea demurrer. Joinder in demurrer.

The cause was tried before Pigott, B., at the Middlesex sittings after Trinity Term, 1869, when it was proved that on the 16th of June, 1845, Godfrey Thurgood leased the premises in question to the plaintiff for 24¾ years, subject to covenants by the plaintiff to pay rent quarterly, to repair, keep in repair, and to leave in repair. On the 8th January, 1846, the plaintiff by deed assigned the lease and premises to Edward Bagley, and between the date of that deed and the month of February, 1859, there were various assignments of the lease and premises; but on the 21st of February, 1859, they were re-assigned to the plaintiff by one James Clark. On the 3rd of May, 1860, it was agreed between the plaintiff and the defendants, Messrs. Garrett and Co., that they should purchase the lease and premises, the plaintiff to "pay all rent, rates and taxes to the 9th of May next, being the half-quarter day, on which day he will give up possession of the said premises to Messrs. Garrett & Co., or to whom they may appoint." In pursuance of this agreement the plaintiff, on the 17th of May, assigned to Francis Bartley, the appointee of the defendants. There was an express covenant by Bartley to perform all the covenants in the lease, and to indemnify the plaintiff against all subsequent breaches. On the 14th of July following Bartley mortgaged, by way of underlease, the premises to the defendants; and on the 23rd of November executed a complete assignment to them, by endorsement on the mortgage; the defendants covenanting with him for the due payment of the rent reserved by, and the covenants contained in, the original lease. Bartley immediately quitted possession, and the defendants entered and remained until the 29th of January, 1867, when they assigned to one Higgins. Whilst the defendants and Higgins were in possession the premises became out of repair, and the executors of Thurgood sued the present plaintiff on the covenant to repair contained in the original lease, and recovered a verdict against him for 158*l.* 10*s.* The plaintiff thereupon commenced this action, but

eventually only insisted on recovering damages for such of the breaches complained of as had occurred whilst the defendants were themselves in possession.

A verdict was entered for the defendants, with leave to move to enter a verdict for the plaintiff for 75*l.* (an agreed sum) if the Court should be of opinion that, upon the evidence, he was entitled to succeed.

A rule was accordingly obtained in Michaelmas Term calling on the defendants to shew cause why a verdict should not be entered for the plaintiff on the ground that, during the time the defendants were assignees of the lease, a duty was cast upon them to perform the covenants in the lease, and hold the plaintiff harmless therefrom.

Nov. 13. *Manisty, Q.C.*, and *R. D. Bennett*, shewed cause. The defendants were the assignees of an assignee, and between them and the plaintiff there was no privity, either of contract or estate. In *Burnett* v. *Lynch* (1) the plaintiff and defendant were in immediate connection as original lessee and first assignee. The only authority in support of the plaintiff's contention in the present case is the observation of Lord Denman, C.J., in *Wolveridge* v. *Steward*. (2) That dictum is not warranted by *Burnett* v. *Lynch* (1), on which it professes to be founded. Here there was an express covenant by Bartley with the plaintiff to perform the covenants in the lease, and indemnifying him against breaches. The plaintiff's right remedy, therefore, was against Bartley, who in his turn might have sued the defendants on their express covenant with him.

H. T. Cole, Q.C., and *Merewether*, in support of the rule. The case is directly within the doctrine of *Burnett* v. *Lynch* (1), as explained in the dictum of Lord Denman, C.J., in the Exchequer Chamber in *Wolveridge* v. *Steward*. (2) The lessee and all the assignees, whether immediate or ultimate, stand to each other in the relation of surety and principals; and if the lessee is obliged to pay the lessor damages for a breach of covenant committed by an ultimate assignee during his term, he is entitled to recover what he pays from such assignee, who would be primarily liable. The

(1) 5 B. & C. 589. (2) 1 C. & M. at p. 659.

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circumstance of there being express covenants to indemnify between each assignee and his immediate assignor cannot affect the plaintiff's right.

Cur. adv. vult.

Feb. 23. The Court differing in opinion, the following judgments were delivered:—

CHANNELL, B. This case came on for trial before my Brother Pigott at the Middlesex sittings after last Trinity Term. There was no dispute as to the facts. A verdict pro forma was directed for the defendants, with leave to the plaintiff to enter a verdict for him for the sum of 75*l*. This sum was agreed upon between the parties as the amount of which, if any, the plaintiff was entitled to recover against the defendants, being the damages in respect of breaches of covenant by the defendants whilst they were assignees of the lease, as hereinafter mentioned. In Michaelmas Term a rule to shew cause was obtained to enter the verdict for the plaintiff. This rule was, in the absence of the Lord Chief Baron, argued before my Brothers Pigott, Cleasby, and myself by Mr. Manisty on the part of the defendant, and Mr. H. T. Cole for the plaintiff. We took time to consider. I now proceed to deliver the judgments of my Brother Pigott and myself.

The facts are shortly these. The plaintiff was the lessee of certain premises under a lease containing covenants by him usual in leases. He assigned to one Bartley, who assigned to the defendants. The defendants afterwards assigned over, but they had during the time they were assignees committed breaches of the covenants in the original lease. For these breaches of covenants the plaintiff, as lessee, was sued by the lessor, and he paid to him the beforementioned sum of 75*l*. He now seeks to recover from the defendants the amount so paid by him to the lessor. The assignment to Bartley was made to him as the nominee of the defendants, under a contract between the plaintiff and defendants; but that does not appear to us to be material. It might be that by that contract the defendants expressly indemnified the plaintiff against all future breaches of covenant; such, however, does not appear from the contract as recited in the declaration. On the other hand it would rather appear, from the fact that the assignment was not to be

made direct to the defendants, but to their nominee, that the intention then was that the defendants should not be liable at all upon the covenants of the lease. It is, therefore, by the subsequent assignment by Bartley to the defendants that they become liable, if at all.

On the part of the plaintiff it was insisted that the case came within the principle of *Burnett* v. *Lynch*. (1) There the plaintiff, the lessee, had assigned directly to the defendants, whereas in the present case there is an intermediate assignee, and the question we have now to decide is, whether this makes a material distinction between the cases. In *Burnett* v. *Lynch* (1) the liability of the defendant was based upon a duty on his part to perform the covenants upon which it was held that the plaintiff could sue. This duty, however, appears to arise out of contract, and it has been held that where this is the case a stranger to the contract cannot sue for the breach of the duty any more than he can for a breach of the contract: *Winterbottom* v. *Wright*. (2) If then there is no contract, either expressed or implied, between the parties, no action can be maintained upon any duty as between them founded upon any contract by the defendants either with Bartley, or with any person other than the plaintiff. In *Burnett* v. *Lynch* (1) the judges appear to have thought there was a contract between the parties, although not a covenant, the assignment there having been by deed poll. The contract then must be considered to have arisen from the defendant's acceptance of the estate assigned to him by the deed poll. In subsequent cases, however, the principle upon which *Burnett* v. *Lynch* (1) was decided has been further explained.

In *Humble* v. *Langston* (3), Baron Parke says, in reference to *Burnett* v. *Lynch* (1), "the assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable in the nature of a surety as between himself and the assignee for the performance of the same covenants."

In the case of *Wolveridge* v. *Steward* (4), in the Exchequer Chamber, Lord Denman, in delivering the unanimous judgment of the

(1) 5 B. & C. 589.
(2) 10 M. & W. 109.
(3) 7 M. & W. at p. 530.
(4) 1 C. & M. 644.

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Court of Exchequer Chamber, after time had been taken to consider, said (1): "*Burnett* v. *Lynch* (2) proceeds on the ground that during the continuance of the interest of the assignee there is a duty on his part to pay the rent and perform the covenants. . . . This duty, we think, would arise from the relation between the parties, without any such words as are now under consideration, [viz.: subject to the performance of the same covenants, &c.,] for the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound, whilst he is assignee, to pay the rent . . . and the surety, after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal." He then goes on to add: "And he (that is, the lessee, after discharging the obligation) would also, in all probability, have the same remedy over against each subsequent assignee in respect of breaches committed during the continuance of the interest of each of them, for the lessee is, in effect, a surety for each of them to the lessor." If that view be correct, the plaintiff in this case is entitled to succeed.

On the whole, we think it is correct. It is true that there is no express contract between the parties, but they are each liable to the lessor for the performance of the covenants. They are each directly liable, and the lessor may sue either at his option, but the assignee having at the time the estate which has been the consideration for the covenants ought, as between himself and the lessee, to perform them.

Thus it is only reasonable to hold, as was suggested in the cases quoted, that the liability of the lessee is as a surety for the assignee, and that there is an implied promise on the part of each assignee to indemnify the lessee against liability for breaches of covenant whilst he is assignee.

If there is any implied promise on the part of any subsequent assignee after the first to indemnify any one in respect of breaches of covenant whilst he is assignee, it must be a promise to the original lessee, for none else is liable, except for breaches committed whilst he is assignee. It would, of course, require an express covenant to make an assignee liable for breaches after he had

(1) 1 C. & M. at p. 659. (2) 5 B. & C. 589.

assigned over. In the present case there were such express covenants on the part of Bartley to Moule, and on the part of the defendants to Bartley, by which they both became liable to indemnify their immediate assignor for all breaches during the remainder of the term.

These express covenants clearly create a greater liability than under the implied promise which was in *Wolveridge* v. *Steward* (1) suggested, and which we think exists between assignee and original lessee. It does not seem to us that the fact that there is a liability on the part of the defendants towards their assignor upon an express covenant to indemnify him against all breaches, not only in their own time, but subsequently, ought to induce us to hold that there can be no liability to the plaintiff upon an implied promise of indemnity not so extensive. In the present case there is a count for a breach of duty, and also a count for money paid. We think the plaintiff is entitled to recover on one of those counts. If there is such an implied promise, and such a duty arising upon it as we have described, the circumstances would be such that the law would infer a request so as to support the count for money paid. We do not think it any objection to this that the plaintiff paid to discharge his own liability, and not solely on behalf of the defendants. It is true that the plaintiff was directly liable to the lessor, but the defendants were so also, and as between the two the defendants, having had the whole consideration for which this liability was undertaken in the enjoyment of the estate during the time that the breaches were committed, ought to have paid.

The question involved in this case is one which may not unfrequently arise. We have not been able to find any decision directly in point. We have had the advantage of considering fully the views entertained by my Brother Cleasby on the subject. We regret to find there is a difference between us upon the point, and we are not unmindful of the doubts which his views suggest as to the correctness of our judgment. We admit that the passage we have quoted from *Wolveridge* v. *Steward* (1) was only a dictum, not necessary for the decision of the particular case before the Court, but it was a dictum contained in a written judgment of the Exchequer Chamber. The view it suggests is, we think, in accord-

(1) 1 C. & M. at p. 659.

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ance with the justice of the case, and is not, as far as we can find, opposed to any direct decision upon the subject. We are therefore of opinion that the rule to enter the verdict for the plaintiff should be made absolute.

CLEASBY, B. In this case the plaintiff is lessee by deed of certain premises which he covenanted to repair. He assigned to one Bartley, and Bartley assigned to the defendants. Both of these assignments contain covenants by the assignee with his assignor to perform the covenants in the lease, and to indemnify his assignor against breaches of covenant.

The defendants afterwards assigned the lease, but while they were assignees there were breaches of the covenant to repair. The assignment by them was dated the 23rd of November, 1860, and the breaches of the covenant to repair continued afterwards, and the premises became more dilapidated.

Some time after the assignment by the defendants, the lessor brought an action against the plaintiff, as lessee, for the breach of this covenant in the lease, and may be taken to have recovered a considerable sum in respect of the then dilapidated condition of the premises, including the dilapidations while the defendants were assignees. The present action is brought to recover over against the defendants in respect of the dilapidations during their term.

There is no doubt that the defendants were liable in that respect to the lessor, and were also liable to their assignor upon their covenant to repair, and to indemnify (to what extent as regards damages would depend upon circumstances which it is unnecessary to consider). But the question in the present case is whether they are liable to the present plaintiff.

In the first place, it seems clear that the claim in the present case is one for unliquidated damages. The foundation and the sole foundation for the claim is the dilapidated condition of the premises during the time when the defendants were assignees, and whatever the plaintiff has been compelled to pay, the defendants were entitled to prove that during their time they properly repaired, or that the dilapidations were trifling. The count for money paid to the use of the plaintiff cannot therefore, I think, be sustained. There is also another objection to that count being

sustainable, viz., that the money was paid by the plaintiff in discharge of his own covenant as lessee when sued upon it; and he did not incur that liability at the request, express or implied, of the defendants; he incurred it for his own purposes when he became lessee, and before the defendants had or could have any interest in the matter.

But another question of more difficulty arises, viz., whether as between the present plaintiff and defendants there is any legal liability by reason of the plaintiff having been compelled to pay under his covenant damages attributable in part to the time while the defendants were assignees. In the first place, let us consider the contracts entered into. The plaintiff by the lease covenants with the lessor to repair, &c., and that is the only contract entered into by him. He afterwards assigns his interest, and as he cannot get rid of his liability, he protects himself by taking from his assignee, Bartley, an absolute covenant to perform the several covenants in the lease, and to indemnify him, the plaintiff, from all breaches. This is the only contract entered into with the plaintiff.

As regards the defendants, the only contracts entered into by them are those which result from the deed of assignment to them which they execute, and the effect of this deed is to make them covenant with the lessor to perform the covenants in the lease, and covenant to the same effect with their assignor. The first covenant is founded upon the privity of estate between them and the lessor; and the second, upon the express contract contained in the deed. It cannot be contended that there is any covenant with the lessee, and the express contracts by deed exclude any implied contract. But a question remains, whether by virtue of the relation between the parties, viz., the one being lessee and the other the assignees of the lease, there arose a duty independent of contract to perform the covenants, and it was contended that there was such a duty upon the authority of the case of *Burnett* v. *Lynch* (1), and of what was said by Lord Denman in giving judgment in *Wolveridge* v. *Steward*. (2) In the first cited case it was held, that upon the assignment of a lease by the plaintiff to the defendant by deed poll, the defendant not executing the assignment or entering into any express covenant, yet as the assignee took the estate from the

(1) 5 B. & C. 589.

(2) 1 C. & M. at p. 659.

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lessee, subject to the covenants, there was a duty on his part of the assignment to perform the covenants, in respect of a breach of which the plaintiff could maintain an action. This decision has never been questioned; but it is to be observed that in that case the transaction was between those two parties, and there was a clear privity between them, the one taking the estate from the other.

In the case secondly referred to, of *Wolveridge* v. *Steward* (1), it was in substance decided that the assignee of a lease is, in the absence of an express covenant, liable to his assignor only in respect of breaches of covenant which occur before he assigns over.

At the close of the judgment it is said: "For the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound while he is assignee to pay the rent and perform the covenants running with the estate, and the surety, after paying the debt or discharging the obligations to which he is liable, has his remedy over against the principal. And he would also *in all probability* have the like remedy over against each subsequent assignee in respect of breaches committed during the continuance of the interest of each." It is entirely upon the authority of this dictum that it is contended the present action is maintainable. It is to be observed with reference to this case that the learned judge had just before referred to *Burnett* v. *Lynch* (2), and is certainly not speaking of cases in which the several assignees had entered into covenants by deed. It may also, I think, be questioned whether the terms principal and surety are properly applied in this dictum to the remote assignee and lessee. In a case of *Humble* v. *Langston* (3) (which was an action for indemnity against calls), Parke, B., said that the relation between lessee and his assignee was in the nature of that of surety and principal. This must not be read as a decision that they really stood in that legal relation, but the idea is adopted and extended in the dictum referred to in *Wolveridge* v. *Steward*. (1) It is there however introduced by the words "in all probability." There is some resemblance, no doubt, between the two relations, because it is the duty in the first instance of the assignee who is in possession to repair, and his

(1) 1 C. & M. at p. 659. (2) 5 B. & C. 589.
(3) 7 M. & W. 517.

neglect to do so causes the liability of the lessee; but when we consider on what the lessor's claim against him is founded, it is not as surety, but as the person contracting as principal, and in fact the only person contracting, and it would rather seem that the contract or duty between the lessee and his assignee, if implied, is of the same nature as is generally expressed between them and expressed in this case, viz., one of indemnity and not of suretyship. The contract of a surety on behalf of his principal is of a special nature, with peculiar incidents to it; for instance, the giving of time to the principal discharges the surety. But it could hardly be contended that the covenant of the lessor would be discharged by giving time to the assignee. I cannot help thinking that the word surety in the passages referred to is rather used by way of illustration than of defining the legal relations of the parties, and that any conclusion founded upon the use of the word could not be safely relied on. It appears to me that between such remote parties there is an entire absence of that privity which is required to raise any implied contract between them, or any duty in respect of which an action can be brought. No attempt has up to the present time been made to enforce such a liability. The question is, does any duty arise out of the relation of the parties independent of contract? It may be tested thus: suppose upon the sale of a lease near the end of a term, with a prospect of heavy dilapidations, the contract to be that the assignee shall pay a certain premium, and the assignor take upon himself all the repairs for the residue of the term, and this was afterwards carried into effect by the assignment, the assignor covenanting with the assignee to do all requisite repairs and pay for the dilapidations. The assignee would, of course, be liable to the lessor by virtue of the privity of estate; but could it be said that in such a case there was any duty or obligation to indemnify the lessee arising from the relation between the parties? I think not; and if that be correct, it appears decisive of the present question.

But, further, it seems a very strong objection against implying any such duty as is relied on that if the plaintiff were to recover against the defendants in the present case, that recovery would not be a bar to a subsequent action in respect of the breach at the suit of Bartley against the defendants upon their express covenant. The

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question of damages would be a complicated one, but the right to recover can hardly be questioned, and in case the recovery in the present action was not productive of satisfaction, and damages were afterwards recovered against Bartley by the present plaintiff in respect of the non-repair during Bartley's term, the defendants would be liable to Bartley upon their covenant in respect of a portion of the damages recovered in the present action. This difficulty does not exist in the case of *Burnett* v. *Lynch* (1), and it forms a real distinction between the two cases. It may further be noticed, in considering the general question whether such a duty arose, that premises might be assigned in parts by an assignor to several assignees, one building to one, land to another, and other buildings to others, with particular covenants as between the assignor and assignees as to each, to all which the lessee is an entire stranger; and this increases the difficulty of holding that there is any privity or duty as between the lessee and the several remote assignees. Upon the whole matter, it certainly appears to me that the doctrine of *Burnett* v. *Lynch* (1) cannot properly be extended to the present case, and that the rule to enter a verdict for the plaintiff ought to be discharged. (2)

Rule absolute.

Attorneys for plaintiff: *Robinson & Preston.*
Attorney for defendants: *H. D. Roberts.*

(1) 5 B. & C. 589.
(2) The demurrer was disposed of without argument.

BOLTON *v.* BOLTON.

1870
Jan. 29.

Will—Construction—Devise without Words of Limitation—Charge on Lands Devised.

By a will, executed in 1834, a testator devised land to his son George without words of limitation, and further devised that if George should die before his wife, she should have "the above property and estate" for her life, "after whose decease" he devised the same to the five children of his son William, share and share alike, with a clause of survivorship in the event of any of them dying before the said "property and estate" should become vacant. He also gave personal estate to George, and charged both the personalty and realty with the payment of 100*l.* :—

Held, that the devise to George was equivalent to an express devise of an estate for life, and that the children of William took vested estates as tenants in common in fee, in remainder after the life estates of George and his wife.

SPECIAL case stated in an action of ejectment brought to recover one-third of certain premises devised by the will of George Bolton to his son George, with certain limitations in favour of the wife of George and the children of his other son William, under which the plaintiff claimed as one of the grandchildren.

The plaintiff had filed a bill for partition in Chancery which had been dismissed on the ground that, as he had never been in possession, he must seek his remedy by action. (1) He, therefore, now brought this action.

The will was executed in 1834, and was in the following words:—

"First, at my decease, I give, bequeath, and demise (sic) to my son, George Bolton, all my premises, containing dwelling house, barn, stables, and outbuildings, situate in the parish of Yelvertoft, in the county of Northampton [then followed a gift to George of furniture, farming stock, &c.] I give, bequeath, and demise (sic) to the said my son George Bolton all those three pieces of land or closes called, &c. [being the subject of this action]. I also give, bequeath, and demise (sic) to my said son George Bolton all the stock that shall be upon this my estate, whether it be of sheep, cattle, or horses; he, my said son George Bolton, paying out of this my personal property and estate the sum of 100*l.*, and a

(1) Law Rep. 7 Eq. 298 (n); on the appeal the Lords Justices intimated an opinion adverse to the plaintiff on the construction of the will.

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second sum of 100*l.* to be paid by my son William Bolton, hereinafter mentioned, as a joint payment I entail upon my two sons George and William Bolton equally. *And my further will is*, that should it please God to call from this life my said son George Bolton before his lawful wife Elizabeth Bolton, that she, the said Elizabeth Bolton, shall have the full use and enjoyment of the above my property and estate for the term of her natural life, that is, that she retain, hold, and keep possession of the said premises, furniture, linen, stock, and all those three closes or pieces of land called, &c. [being the same before mentioned], *after whose decease* I give, bequeath, and demise (sic) all the before-mentioned property and estate to my five grandchildren, Robert, George, William, Elizabeth, and Anne Bolton, lawful children begotten of my said son William Bolton, equal share and share alike of the said property and estate; *but should any one or more of my said grandchildren die before such of my property and estate becomes valid or vacant*, then shall the surviving children take equal shares of such deceased child or children's share of the said property and estate. [After a devise of other lands, &c., to his son William, without words of limitation, and without any gift of personalty, the testator proceeded]:—He, my said son William Bolton, paying thereout 100*l.*, and another 100*l.* paid by my said son George Bolton before-mentioned, a joint payment I entail upon my two sons equally, that is, that they pay 100*l.* each out of my personal property and estate bequeathed to them separately. This my real property and estate I give and bequeath to my two sons George and William, they paying thereout 100*l.* each as above expressed in this my will."

The will was witnessed by George, the testator's son; the gift, therefore, to him was void by 25 Geo. 2, c. 6, s. 1; but, George being the testator's eldest son and heir at law, the estate returned to him for all the interest (if any) which was undisposed of by the will.

George and his wife Elizabeth both survived the testator; George survived his wife, and died without having had any children on the 25th of November, 1865.

Robert and Anne, two of the grandchildren mentioned in the will, survived Elizabeth, but died in the lifetime of George.

Robert, the eldest grandson, died without issue, and George, the next in age, became the heir at law of his uncle, as well as of Robert and Anne.

George, the testator's son, remained in possession of the premises devised to him during his lifetime, and at his death George, the grandson, succeeded him in possession of the whole. William, the grandson, claiming under the will, brought this action of ejectment to recover one-third part of the premises, claiming to be entitled as one of the three grandchildren who survived their uncle. (1)

Keane, Q.C. (*Wills* with him), for the plaintiff. The will gave the premises after the death of George and his wife to the grandchildren as tenants in common in fee. He cited *Denn* v. *Gaskin.* (2)

THE COURT called on

Manisty, Q.C. (*Merewether* with him), for the defendant. The devise to George was void by 25 Geo. 2, c. 6, s. 1 (3), but he took

(1) After the commencement of the action George the grandson died, and Matilda, his only daughter and heiress at law, entered into possession and appeared to defend.

(2) 2 Cowp. 657.

(3) The question was referred to, but not argued, whether the devise to his wife was also void; in support of the affirmative the authority of *Hatfield* v. *Thorp* (5 B. & A. 589) was claimed. There, on an issue from Chancery, the plaintiff claimed as heir at law of Elizabeth Hatfield, the wife of an attesting witness; and the Court in answer to the question whether the will "was duly attested to pass any and what estate" to the devisee, certified that the will "was not duly executed so as to pass any real estate" to her.

In Jarman on Wills, vol. i. p. 67, 3rd ed., it is suggested that the decision only made the gift to the wife void, but not the will; but in *Holdfast* v. *Dowsing* (2 Str. 1253), the whole will was, under the like circumstances, held void, and the Court answered the argument for the opposite view founded on a supposed expression in *Hilliard* v. *Jennings* (1 Comyns, 90; Freeman, 509; 1 Lord Ray. 505; 12 Mod. 276), "that the will was void *quoad the devise* of lands to the plaintiff," by saying that "whoever reads the will from the record will see that there were no other lands devised, and therefore it is equal to saying it is void as to any passing of lands." In *Hatfield* v. *Thorp* the only parties to the issue were the plaintiff, who claimed as heir at law of the devisee in fee simple, and the heir at law of the testator.

The Statute of Frauds (29 Car. 2, c. 3), s. 5, makes void devises which are not in writing, &c., and "attested and subscribed in the presence of the said devisor by three or four *credible* witnesses." The cases of *Hilliard* v.

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as heir at law (and the defendant takes as his heir at law) whatever was undisposed of by the will. The question, therefore, is what was given to others than himself. First, the express terms of limitation are against the plaintiff. The limitations with respect to George's share are, first, to him without words of limitation, and then, in the event of his wife surviving him, an event different from that of his decease, to her for life, and after her death to the grandchildren. This is a gift in fee to him, with an executory limitation over in an event which did not happen.

[CLEASBY, B. It is a rule that a limitation shall not be construed as an executory devise, if it can be construed as a remainder.]

That assumes that, consistently with the intention of the will, it can be construed as a remainder. But granting that the gifts to the wife and grandchildren were remainders, then it was immaterial when the second life expired; the estates were at once vested in interest; whenever any preceding limitation failed, the succeeding remainder vested in possession; and if there was none capable

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Jennings, and *Holdfast* v. *Dowsing*, decided that a devise to a witness or to his wife rendered him incredible by reason of interest.

The Act of 25 Geo. 2, c. 6, s. 1, provides that a gift to a witness "shall, so far only as concerns such person attesting the execution of such will and codicil or any person claiming under him, be utterly null and void; and such person *shall be admitted as a witness* to the execution of such will or codicil within the intent of the said Act (29 Car. 2, c. 3), notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil;" but says nothing as to a gift to the *wife* of an attesting witness.

By the Wills Act (1 Vict. c. 26), s. 14, "If any person who *shall* attest the execution of a will *shall* at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid;" and s. 15 makes void gifts to attesting witnesses, their husbands or wives, but speaks also in the future; and s. 34 expressly restrains the operation of the Act to wills not executed before the 1st of January, 1838.

6 & 7 Vict. c. 85, enacts that "no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence," but does not give to earlier attesting witnesses credibility at the time when they attested.

It was not, however, argued in this case that the will was void for want of due attestation; there being three witnesses beside George who were credible. That he was a supernumerary witness did not, however, prevent the devise to him from being avoided by the statute: *Doe* v. *Mills* (1 Moo. & R. 288).

of so vesting, all the remainders must have failed. The remainders were, therefore, accelerated by the failure of the gift to George; the wife's estate vested in possession at once, and on her death the estates of the grandchildren vested at once. Therefore, as she died more than twenty years ago, the plaintiff is barred by the statute 3 & 4 Wm. 4, c. 27.

[*Keane, Q.C.*, referred to *Tregonwell* v. *Sydenham.* (1)]

The case cited has no application. There, after previous limitations, a term of sixty years was limited to trustees to raise 20,000*l.*, which was to be invested in lands to be conveyed to certain uses, and "after the same should be raised, or the determination of the term," to certain other uses. The trusts of the 20,000*l.* were (in the event) void for remoteness, but it was held that the trust for raising the 20,000*l.* was good, and that, as it was not intended that the devisees over should take that sum, it became the property of the heir at law as undisposed-of realty. (2) The case, therefore, had nothing to do with the question of the acceleration of the legal estate. The case of *Carrick* v. *Errington* (3) seems at first more in point, where, the limitations of an intervening life estate becoming void, it was held that the remainders to the issue of the life tenant were not accelerated; but there a remainder to trustees to support contingent remainders intervened, and the question was only who should take the profits during that time; it was held, they were undisposed of, and went to the heir. If, therefore, the estates here limited were in remainder, the plaintiff is barred.

But if, as the defendant contends, the limitation to the wife was only on the event of George's dying in her lifetime, it was an executory devise, and the estate never vested in her, the event not happening. Equally the limitation to the grandchildren failed, for their estate depended on the same contingency as hers. The words "after whose decease," must be read with the context; and, so read, they refer to her decease only in the event of her surviving her husband. The true construction, therefore, is, that the estates to the grandchildren were to vest in interest on the event of George's wife surviving her husband (subject to the survivorship clause), and to vest in possession on her subsequent decease; but

(1) 3 Dow, 194. (2) 3 Dow, at pp. 205, 216.
(3) 2 P. Wms. 361.

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the event in question has never happened. But, if the words "after her decease" are read as referring to her decease at any time, so as to allow an immediate vesting in interest (subject to the survivorship clause), there is nothing to prevent a vesting in possession immediately on her decease, the gift to George failing, so that the plaintiff would be barred by lapse of time.

[THE COURT. There is no statement in the case as to the date of Elizabeth's death.]

It was admitted in the proceedings in Chancery that she died before the year 1840. But the defendant's case stands sufficiently strong on the plain construction of the will as above stated, which is confirmed by the terms in which the gift to Elizabeth is introduced, and by the extreme improbability that the testator meant that in the event of George surviving his wife, by whom he had no issue, and marrying again, his possible future issue should be disinherited. The plaintiff's construction, in order to effect this result, seeks to read the will as though the words "after whose decease" (that is, unquestionably, the wife's) were "after the decease of the survivor of George and Elizabeth." He cited *Farmer* v. *Francis.* (1)

Secondly, the gift is coupled with a charge of 100*l.*, which the devisee, without words of limitation, is directed to pay, and this enlarges the estate to a fee. The fact that no destination is given by the will to the sum so charged does not alter its effect, for the inference of the testator's intention remains the same.

Thirdly, the words "property and estate" are used at the close of the will in reference to the gift to George, which gives the fee; and this argument is the stronger from the fact that but for the use of the same words, the grandchildren would only take for life.

Fourthly, the survivorship clause only applies to original, not to accrued shares; these latter fell to the defendant as heir at law of the deceased children, and the plaintiff cannot, in any event, recover the third part of the whole.

[THE COURT assented to the defendant's argument on this point.]

Keane, Q.C., in reply.

Cur. adv. vult.

(1) 2 Bing. 151.

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Jan. 29. The judgment of the Court (Kelly, C.B., Channell, Pigott, and Cleasby, BB.) was delivered by

CLEASBY, B. The only question is, what estate, if any, the claimant took under the will of George Bolton, his grandfather.

The particular share to which the claimant would be now entitled by reason of the death of a brother and sister, also named in the will, was disposed of in the course of the argument, and the only question is as to the proper construction of the will.

It appears that the testator had two sons, George and William. At the time of the making of the will, which was before 1838, when the Wills Act came into operation, the son George was married, and had no children. William was married, and had five children. By his will the testator devised (the words used are "give, bequeath, and demise") certain premises (house, buildings, and closes of land), particularly described, to his son George without any words of limitation. He then directs, that should it please God to call from this life his son George, before his wife Elizabeth Bolton, that she should have the enjoyment of the property for her natural life, and then follow the words "after whose decease I give, bequeath, and demise all the before-mentioned property and estate to my five grandchildren, Robert, George, William, Elizabeth, and Anne Bolton, lawful children, begotten of my son William Bolton, equal share and share alike of the said property and estate," with some benefit of survivorship. He then devises three closes of land to his son William with the following directions: "He, my son William, paying thereout 100*l.*, and another 100*l.* paid by my son George Bolton before mentioned, a joint payment I entail upon my two sons equally—that is, that they pay 100*l.* each out of my personal property and estate bequeathed to them separately. This my real property and estate I give and bequeath to my two sons, George and William, they paying thereout 100*l.* each as above expressed in this my will." He then appoints George and William executors of his will.

In an earlier part of the will the testator had bequeathed certain personal property to George, and directed him to pay the sum of 100*l.* out of it.

In construing this will it is necessary to bear in mind that it bears date previous to the 1st of January, 1838, and therefore the

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Wills Act (1 Vict. c. 26) does not apply to it, and the rule remains in full force, that a devise of messuages and lands (not using the word "estate" or anything equivalent) to a person, without words of limitation, confers an estate for life only. Nothing in the law is better settled than this, as a general rule: Jarman on Wills, ch. 33, vol. ii. p. 247, 3rd ed.; and to depart from it would shake the title to many estates which are still held, and will long continue to be held, under such wills.

It is plain, therefore, that under the terms of the devise to George an estate for life passed. This was hardly disputed, but it was contended, first, that there was such a conditional devise as, according to a well-established rule, enlarged what would otherwise have been an estate for life into a fee; and, secondly, that there was such a direction for the devisee George to pay 100*l.* out of the estate as by another well-known rule had the same effect.

As regards the first ground, nothing is clearer than that an indefinite devise may be enlarged into a fee when there is a devise over upon certain conditions, as, for instance, when there is a devise to A., and in case A. dies under twenty-one then to B. in fee. In this case it is considered absurd to suppose that the case of A. living beyond twenty-one is unprovided for by the testator, and it is implied that he did provide for it in the only manner which can be suggested, namely, by giving A., in that event, the fee. There are various other instances of the same construction prevailing collected in Jarman on Wills, ch. 33, s. 3, vol. ii. p. 251, 3rd ed. But the reason is wholly inapplicable to such a case as the present, where the devise over is to another person for life, and the only condition is, that that person survives the first devisee, which only expresses the necessary condition to the devise over taking effect, and leaves it still an estate for life in remainder, more especially when there is a devise after the death of that person of the whole estate in fee; for the devise to the grandchildren carries the fee, being a devise of the estate and property. An attempt was made (not very properly) to induce the Court to give a particular effect to the words introducing the devise to the wife, by stating that she was in a failing state of health, unlikely to live, and therefore that all that the testator intended to provide for was the particular case

of her surviving her husband, and that the testator could not intend, as was argued, to disinherit his children if he married again and had children. The answer was, first, that the construction of a will cannot depend upon the probability which the testator supposed there was of a devisee losing his wife, and marrying again and having a second family; and, secondly, that there is not upon the case the least foundation for the statement of fact relied on. On the contrary, it does appear that the devisee's wife died, and that he remained a widower for the rest of his life (1), nearly thirty years, so that we are asked to conclude, or rather to assume, that the testator contemplated that something would take place which never did take place. It appears from the facts stated in the case, and upon the will, that the testator provided for all the members of his family existing at the time, and there is no reason whatever for supposing that he contemplated any others to be provided for.

The second ground relied upon was that the estate devised to George was enlarged to a fee by reason of his being directed to pay 100*l.* out of it. The general rule is well established that where there is a devise of land to a man without words of limitation, yet, if he is directed to pay a sum of money out of it, his estate is enlarged into a fee, and the Courts, in construing the will, do not enter into the consideration of the smallness of the amount. And therefore, in the present case, if there had only been the devise to George, and afterwards the direction to pay the 100*l.*, this, notwithstanding that he is, in the first instance, directed to pay it out of the personal estate, and notwithstanding the obscure and incoherent language of the latter part of the will, might have had the effect of enlarging George's estate into an estate in fee. But the examination of the earlier part of the will has shewn that the testator gives the property to George, and after his death to Elizabeth (in case she survives him), and after her death absolutely to the grandchildren; this is the same as giving George expressly and in words an estate for life, and the rule for enlarging a devise to an estate in fee by reason of a payment out of the property undoubtedly does not apply where there is an express

(1) The case stated only that he died without issue.

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estate for life devised: *Willis* v. *Lucas* (1), *Doe* d. *Burdett* v. *Wrighte.* (2)

One other argument urged by the defendant remains to be noticed. It was said that, though the words of the devise to George, taken by themselves, would only give an estate for life, yet, as in the subsequent part of the will, he speaks of the "real property and estate given to George," this had the same effect as if the words "property and estate" occurred in the devise, and so the fee would pass. The clear answer to this is, that the effect of the words "estate or property," to confer an estate in the fee, may always be construed by the context; in the present case, there being in the early part of the will a devise of the lands by their proper description to persons in succession, the use of the words "estate and property" afterwards cannot destroy the devise in succession, and convert the first into a devise in fee.

It appears to us, therefore, that by the will the grandchildren took vested estates as tenants in common in remainder after life estates in George and his wife, and the claimant, as one of them, is entitled to recover his one-fifth, and also what in addition accrued to him by survivorship.

Judgment for the plaintiff.

Attorneys for plaintiff: *Iliffe, Russell, & Iliffe, for Harris, Rugby.*

Attorneys for defendant: *Skilbeck & Griffith, for Watson & Co., Lutterworth.*

(1) 1 P. Wms. 472. (2) 2 B. & A. 710.

STOWE AND OTHERS *v.* QUERNER. 1870

Evidence—Action on Policy of Insurance—Admissibility of Copy—Admission—Province of Judge—Stamp. *Feb.* 9.

On the trial of an action on a policy of insurance, in which the existence of the policy was in issue, the plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they thereupon, with a view of proving that it had been duly executed, proceeded to put in a document purporting to be a copy of the policy which they had received from the defendant's broker. The defendant objected, and requested the judge to hear evidence to shew that no original policy was or ever had been in existence. The objection was overruled, and the alleged copy admitted. Later in the cause the defendant gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed, any policy at all executed, and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury found in the affirmative :—

Held, that the question was rightly left to the jury, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties.

DECLARATION, in the ordinary form, on a policy of marine insurance by the assured against the underwriter.

Plea (inter alia), that the defendant did not become an insurer as alleged.

At the trial before Hayes, J., at the Liverpool summer assizes, 1869, the plaintiffs, who had not received their policy, proposed to prove that it had been executed by the defendant, to whom notice to produce it had been given, by tendering an unstamped document purporting to be a copy of the original policy, which had been delivered to them by the defendant's broker. The defendant's counsel, upon the alleged copy being tendered, claimed to be allowed to shew that no stamped policy, and, indeed, no policy at all, had ever been executed, and requested the learned judge to hear evidence to that effect before he permitted the copy to be read. The learned judge declined to sanction the adoption of this course, being of opinion that if he were to receive the evidence tendered, and decide whether there was or was not an original stamped policy, he would be in fact deciding the main question in the cause. The copy policy was admitted accordingly, and it was not until the defendant's case had been entered upon that any evidence was given to the effect that no original policy

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existed. At the close of the case the jury, in answer to the question left them by the learned judge, found that there had been a stamped policy duly executed, and a verdict was entered for the plaintiffs for 100*l.*, the amount underwritten for by the defendant.

In Michaelmas Term, 1869, a rule for a new trial was obtained, on the ground of misdirection and misreception of evidence in this, that the admissibility in evidence of the alleged copy policy was a question for the decision of the judge, and not for the jury, and ought to have been decided by him when the evidence was tendered.

[There were also other points on which leave to move to enter a nonsuit was reserved, but as the judgment of the Court did not deal with them, they are not noticed here.]

Feb. 8. *Butt, Q.C.*, and *Trevelyan*, shewed cause. The copy policy was admissible as *primary* evidence. It came from the defendant's broker, who must be assumed to have been acting legally. But, if no stamped policy existed, he would be liable to a penalty of 500*l.* under 30 Vict. c. 23, s. 15. It is therefore to be treated as an admission, on behalf of the defendant, that a duly stamped original existed, and the delivery of it to the plaintiffs was an act of admission: *Slatterie* v. *Pooley* (1); *Reg.* v. *Basingstoke* (2); *Boyle* v. *Wiseman* (3); *Bartlett* v. *Smith.* (4) If the judge had decided upon the question of the existence of an original policy, he would really have decided the main question in the cause. Whether it was duly stamped or not would have been a question for him, but here the objection taken went to the foundation of the action, and was not founded on the fact of the absence of a stamp on an original admitted to exist.

[MARTIN, B. There is a further difficulty which you have to contend with. Under 48 Geo. 3, c. 149, pt. 1, Sch., the copy policy should itself have been stamped.]

No stamp is necessary where the copy is tendered as an admission. That objection, moreover, should have been taken at the trial; and, the document cannot now be deemed inadmissible, on the ground of a mere stamp objection.

(1) 6 M. & W. 664, 669.
(2) 19 L. J. (M.C.) 97.
(3) 10 Ex. 647; 24 L. J. (Ex.) 160.
(4) 11 M. & W. 483, 486.

[PIGOTT, B., referred to *Braithwaite* v. *Hitchcock* (1), as shewing that where a copy is not produced in evidence *as a copy*, it does not require a stamp. (2)]

Quain, Q.C., and *Dr. Commins*, in support of the rule. The copy policy was not received as an admission. It purported to be the copy of a stamped original, and was tendered as such by the plaintiffs, who laid the foundation for its reception by giving the defendant notice to produce and calling upon him to produce the alleged original. Before admitting it the judge ought to have heard the evidence offered by the defendant, and to have himself decided at that stage of the cause whether a duly stamped policy existed; and it makes no difference that he might by so doing in fact incidentally have decided the main issue between the parties: Taylor on Evidence, vol. i. p. 35, 3rd ed. The point is similar to that which often occurs in cases of pedigree, where the judge is bound to decide whether a declarant has been proved to be a member of the family: *Doe* d. *Jenkins* v. *Davies* (3); *Doe* d. *Padwick* v. *Wittcomb*. (4) At any rate, the judge ought to have decided whether there was a properly stamped policy executed.

[MARTIN, B. The question as to the stamp is, no doubt, for the judge. But here the objection was not the mere absence of a stamp on the original, but the absolute non-existence of any original at all, stamped or not.]

Cur. adv. vult.

Feb. 9. The following judgments were delivered:—

BRAMWELL, B. In this case the question which was argued before us yesterday arose thus:—during the trial of an action on a policy of insurance it became necessary to produce the policy, and the plaintiffs gave evidence of a duly stamped policy having been executed, and of its being in the possession of the defendant. Notice to produce had also been given. Upon its being called for, however, the defendant declined to produce it, and thereupon

(1) 10 M. & W. 494, 497.

(2) *Quain, Q.C.*, referred to *Nixon* v. *Albion Marine Insurance Co.* (Law Rep. 2 Ex. 338), to shew that the Court would at any time take cognizance of a stamp objection, but this point was not pressed.

(3) 10 Q. B. 314.

(4) 6 Ex. 601.

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the plaintiffs proposed to read a document which purported to be a copy, and which they had received from the defendant's broker. The defendant objected, and offered to displace the effect of the evidence of the existence of the policy which had been given by the plaintiffs, and to render the copy inadmissible by shewing that no policy had ever been executed at all. The judge refused to hear this interlocutory evidence, and allowed the document to be admitted and read. We are all of opinion that he was right. If the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would perhaps have been well founded. But here it was objected that there was no policy executed at all; an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. For, suppose the judge had ruled that the copy was inadmissible on the ground that there was no original ever in existence, the plaintiffs would in fact have had no case left, and the judge would himself have decided the whole of it. The difference between this case and *Boyle* v. *Wiseman* (1) is very wide. There the plaintiff had the means, if he had chosen, of giving the alleged original in evidence, but here if the copy had been excluded the plaintiffs would have been left without any means of proof whatever. Put an illustration analogous to the present. Suppose an action to be brought for libel, and a copy of a letter which is destroyed, but which contained the libel complained of, is produced and tendered in evidence. Could the defendant say, "Stop; I will shew that no letter was in point of fact ever written, and I call upon you, the judge, to hear evidence upon this point, and if I satisfy you that no such letter ever existed, you ought not to admit the copy?" Surely not: for that would be getting the judge to decide what is peculiarly within the province of the jury. The distinction is really this: where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to shew that the very substratum and foundation of the cause of action is

(1) 10 Ex. 647; 24 L. J. (Ex.) 160.

wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury.

It was further said there was no *stamped* policy in existence. But the real objection, as I have already observed, was that there was no policy at all, and therefore, of course, no stamped policy. The want of stamp was not the actual point relied on, and it was in a manner merged in the other objection. We are, therefore, of opinion that this rule should be discharged.

MARTIN, B. I agree with my Brother Bramwell. My only doubt has been whether the plaintiffs were not entitled to have the judge's opinion on the question of the existence of a *stamped* original, and also on that of the necessity of the copy being stamped; but, having regard to the nature of the objection taken, I think the judge took the right course.

PIGOTT, B. I am of the same opinion, and for myself would add that I think the copy tendered was, under the circumstances of the case, admissible as *primary* evidence, being in fact an admission that a duly stamped policy had been issued.

CLEASBY, B. I agree with the rest of the Court, but have nothing to add to the judgment of my Brother Bramwell, which entirely expresses my view of the case.

Rule discharged.

Attorneys for plaintiffs: *Westall & Roberts.*
Attorneys for defendant: *Chester & Urquhart.*

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CLOWES *v.* HUGHES and Another.

Landlord and Tenant—Mortgagor and Mortgagee—Change of Relation—Proviso for Tenancy arising on Default in Payment by Mortgagor—Notice of Commencement of Tenancy.

By a mortgage deed it was provided that the mortgagor, in the event of his making default in payment of the sums advanced to him, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease. The mortgagor having made default, the mortgagees, without having given him any notice of their intention thenceforward to treat him as a tenant, distrained, after the lapse of more than a year from default, as for a year's rent in arrear:—

Held, that, not having given him notice of their intention to treat him as a tenant, they were not entitled to distrain.

Trover by the plaintiff, as administratrix of Edward Clowes, deceased, for certain goods alleged by the plaintiff to have been wrongfully distrained by the defendants. Pleas: 1. Not guilty. 2. Not possessed. Issue.

At the trial before Bovill, C.J., at the Carnarvon summer assizes, 1869, it appeared that a bill of sale comprising the goods in question was executed in 1866 by one Lewis Davies to Edward Clowes, and was afterwards duly registered. The goods remained in the possession of Davies. A short time afterwards Davies became a member of a benefit building society, whereof the defendants were trustees. They advanced him a sum of 500*l.* under the rules of the society, and on the 24th of December, 1866, he executed a mortgage of a house and land to them as a security for the money lent to him, and for payments in respect of his shares in the society. Edward Clowes, who had a mortgage for 215*l.* on the same premises, was a party to this deed for the purpose of consenting to the sum of 500*l.* advanced by the defendants having priority over his own security. The indenture of mortgage contained the following stipulation, in addition to the provisions as to power of sale, &c., for the benefit of the mortgagee, usually found in mortgagee deeds: "It is hereby agreed and declared that if the said Lewis Davies, his heirs, &c., shall at any time hereafter make default in any one or more of the payments which now are or may

hereafter be required to be made by the rules and regulations for the time being in force for the government and guidance of the said society in respect of his said shares therein, and in respect of the said several payments, whether for subscription, redemption money, fines, or otherwise, or performance in all respects of the same rules and regulations, then *immediately or at any time after such default* shall have been made, the said Lewis Davies, his executors, administrators, or assigns, shall and will hold the said premises expressed to be hereby conveyed as yearly tenant to the said several persons parties hereto of the fourth part [the defendants], their heirs or assigns, or the trustees or trustee for the time being of the said society from the day of the date of these presents at and under the yearly rent of 57*l.* 11*s.* 8*d.*, payable by equal portions on the first day of May and the first day of November in every year; and that they, the said trustees or trustee for the time being, shall have the same remedies for recovering the said rent as if the same had been reserved upon a common lease." Upon the land, which was the subject of this mortgage, were the goods comprised in the bill of sale.

In March, 1868, Davies made default in some of the required payments. On the 30th of April, 1869, the plaintiff (as administratrix of Edward Clowes, who had died earlier in the same year intestate), after demanding the sum secured by the bill of sale in the manner therein prescribed, and failing to obtain payment, took possession of the goods in question. Four days later the defendants, as trustees of the benefit building society, distrained the goods for a years' rent alleged by them to have become due on the 1st of May under the provisions of the indenture of mortgage dated the 24th of December, 1866. They had given no previous notice to Clowes of their intention to avail themselves of the power therein contained of treating him as an ordinary tenant instead of a mortgagor in possession. Under these circumstances the question between the parties was, whether the defendants had a right to levy a distress upon the plaintiff's goods.

A verdict was entered for the defendants, with leave to move to enter a verdict for the plaintiff for an agreed sum. In Michaelmas Term, 1869, a rule was obtained accordingly, on the ground that the deed of the 24th of December, 1866, did not give law-

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ful authority to the defendants to distrain the goods of a third person.

Jan. 18. *McIntyre* and *Willis* shewed cause, and contended that upon default made by Davies, the relation of landlord and tenant was, under the deed of the 24th of December, 1866, ipso facto, created between him and the defendants. That being so, the goods of the plaintiff being found upon the premises demised were liable to distress. The mode in which the relation arose could not affect the question. Davies having once become a tenant instead of a mortgagor in possession, all the ordinary incidents of a lease attached to the property comprised in the mortgage. Clowes, moreover, was not an entire stranger to the arrangement between the defendants and Davies, having himself been a party to the deed of the 24th of December, 1866. There was no need to insert an express power to distrain. *Pinhorn* v. *Souster* (1); *Walker* v. *Giles* (2); *Miller* v. *Green* (3); *Shaw* v. *Kay* (4); *Brown* v. *Metropolitan Counties Life Assurance Society.* (5)

M. Lloyd, and *J. Sharpe,* in support of the rule. The proviso in the deed leaves it uncertain when the tenancy is to commence, a circumstance which distinguishes this case from those cited for the plaintiff. But a tenancy must commence at a time certain: Sheppard's Touchstone, 7th ed. vol. ii. p. 272. Here no certainty was attained, for the defendants never demonstrated by any open, unequivocal act their intention to treat Davies as a tenant. They ought to have given him notice, and thus fixed the point of time at which they had resolved to change his position. The true meaning of the provision, that "immediately or *at any time after*" default, the mortgagor may be treated as a tenant, is, that at any time after default which the defendants think fit to fix upon and indicate to him, they are to become landlords instead of mortgagees. Again, the amount due under the mortgage was necessarily variable, which furnishes an additional reason against the plaintiff's construction of the proviso.

(1) 8 Ex. 763; 22 L. J. (Ex.) 18.
(2) 6 C. B. 662; 18 L. J. (C.P.) 323.
(3) 8 Bing. 92.
(4) 1 Ex. 412; 17 L. J. (Ex.) 17.
(5) 28 L. J. (Q.B.) 236.

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[KELLY, C.B. More than a year's rent at the rate specified was in arrear on the 1st of May.]

There had no doubt been a default within the terms of the proviso, but the defendants, not having given any notice, were left to the ordinary remedies of a mortgagee. The actual distress cannot be relied on as a sufficient notice to create the relation of landlord and tenant retrospectively: *Wyburd* v. *Tuck* (1); at all events quoad the rights of third persons. Clowes was a party to the deed, it is true, but only to relinquish a specified right.

Cur. adv. vult.

Feb. 11. The judgment of the Court (Kelly, C.B., Martin, Channell and Pigott, BB.) was delivered by

MARTIN, B. [who, after adverting to the facts of the case, proceeded]:—The question turns upon the proper construction to be placed on the provision contained in the mortgage deed of the 29th of December, 1866; according to which, if Lewis Davies, his heirs, &c., should at any time thereafter make default in any of the payments to which he was or might become liable to the defendants, as trustees of the benefit building society to which he belonged, "then immediately or at any time after such default" he should hold the premises, comprised in the deed, of the defendants as a yearly tenant at a rent of 57*l.* 11*s.* 8*d.*, payable on the 1st of May and the 1st of November in each year. The defendants contended that under this clause Davies became their tenant upon his making default in March, 1868, and that they were therefore justified, on the 4th of May, 1869, in distraining for a year's rent, which, on the supposition that a tenancy had been created by the mere default of Davies, would have been due on the 1st of the same month. We are all, however, of opinion, that as there was no notice or intimation of any kind on the part of the defendants to Davies that they intended to treat him no longer as a mortgagor in possession, but as a tenant, they had no right to distrain. There should have been some communication by them to him of the change they had resolved to make in the terms upon which his possession was suffered to continue, before any action was taken

(1) 1 B. & P. 458.

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against him as an ordinary tenant from year to year under the clause in question. As we take this view of Davies's position, it is unnecessary to add anything upon the point raised as to whether, assuming a tenancy to have been in existence, the goods of the plaintiff, who represented a third party, would have been liable to be distrained. The rule must, in our judgment, therefore, be made absolute.

Rule absolute.

Attorneys for plaintiff: *Rooks, Kenrick, & Harston.*
Attorney for defendants: *E. W. Le Riche.*

END OF HILARY TERM, 1870.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXIII VICTORIA.

CASTLE AND OTHERS *v.* PLAYFORD. 1870 *May* 4.

Vendor and Purchaser— Condition Precedent—Receipt of Bills of Lading—Delivery of Cargo—Agreement that Purchaser shall bear Risks and Dangers of the Sea.

The plaintiffs agreed with the defendant to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the purchaser takes upon himself all risks and dangers of the seas"; and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20*s.* a ton of 20 cwt. weighed on board during delivery.

The vessel was lost during the voyage by risks and dangers of the seas, within the meaning of the agreement, and after the receipt by the defendant of the bills of lading. The plaintiffs having brought an action against the defendant to recover the value of the cargo:—

Held (by Martin and Channell, BB., Cleasby, B., dissenting), that the clause, imposing on the defendant all risks and dangers of the seas, did not accelerate his liability to pay for the goods or to pay a sum equivalent to their value, but only relieved the vendors in a certain event from their liability to be sued for non-delivery, and that, the vessel never having arrived and the goods not having been delivered, the plaintiffs were not entitled to recover.

DECLARATION, setting out an agreement between the plaintiffs and the defendant, dated the 25th of March, 1869, in the following terms:—

"It is this day mutually agreed between F. Castle & Co., of

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Grimsby, as vendors [the plaintiffs] and H. H. Playford as purchaser [the defendant]; the said vendors agree to ship with every despatch during this month and in the customary manner, a quantity of fresh-water ice, in square blocks, say cargo per *Result*, 170 register tons more or less, at vendors' option, all in good and clean condition, and on the same being duly shipped the vessel to be despatched with all speed direct to any port captain likes best, for orders to unload at one safe place in the United Kingdom; twenty-four hours allowed for waiting orders, lay days to count, the said vendors forwarding bills of lading to the purchaser, and upon receipt thereof *the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever;* and the said H. H. Playford agrees to buy and receive the said ice on its arrival at ordered port, or so near thereunto as the vessel may safely get, purchaser taking the said ice from alongside the vessel at his risk and expense, at the rate of twenty-five tons per running day (Sundays excepted), and to pay for the same in cash on delivery, at and after the rate of 20*s.* sterling per ton of 20 cwt. weighed on board during delivery . . . "

Averment, that the cargo of ice was duly shipped and despatched, and a bill of lading forwarded to the defendant, and that he duly received the same, and afterwards, during the voyage, the cargo was wholly lost by risks and dangers of the seas within the meaning of the agreement, and all conditions, &c., yet that the defendant had not paid the plaintiffs the value of the cargo; and, for a further breach, that the defendant did not take upon himself the risks and dangers of the seas and navigation according to the agreement, whereby the value of the cargo was lost to the plaintiffs.

Sixth plea, as to the first breach: That the defendant was always ready and willing, &c., but that the cargo did not arrive at the ordered port, nor were the plaintiffs ready and willing to nor did they deliver the cargo there or elsewhere to the defendant according to the agreement.

Demurrers to the declaration and sixth plea, and joinders in demurrer.

Littler, in support of the demurrer to the declaration and of the plea. The arrival and the delivery of the cargo of ice are condi-

tions precedent to the defendant's liability to pay its value. But the declaration shews that the cargo never arrived, and there is therefore no ground on which the first breach alleged can be supported. With regard to the second breach, the defendant was not, on the true construction of the contract, liable to indemnify the plaintiffs against risks and dangers of the seas, whether the cargo arrived or not. The true effect of the clause in the agreement relating to these risks and dangers was to impose a limitation on the plaintiffs' liability, and not to increase that of the defendant. [He cited *Paynter* v. *James*. (1)]

Huddleston, Q.C. (*A. M. Channell*, with him), contrà. The receipt by the defendant of the bill of lading was, under the terms of the agreement, equivalent to a delivery to and receipt by him of the cargo. After the bill of lading had been so received, he became liable to pay the value of the cargo, and also answerable to the vendors for all loss arising from risks and dangers of the seas.

[He cited *Dutton* v. *Solomonson* (2); *Meredith* v. *Meigh* (3); *Browne* v. *Hare* (4); and Maude and Pollock on Shipping, p. 234.]

Littler, in reply.

MARTIN, B. I am of opinion that the defendant is entitled to judgment. The question turns entirely on the true construction to be put on the contract set forth in the declaration. Now, what is the real meaning of the clause whereby the purchaser takes upon himself all risks and dangers of the seas? It seems to me designed to free the vendors from all liability or responsibility for loss after they had forwarded bills of lading of the goods; and when those bills were received the defendant had, in my opinion, acquired an insurable interest in the cargo. But although this is so, I do not think that the purchaser was responsible to the vendors for the loss of the goods on the voyage, and I am confirmed in this view by reading the remainder of the contract. He was certainly not directly liable to pay their value until they had arrived at the ordered port, and not then until they had been weighed on board. Before the goods were weighed, therefore, the property did not

(1) Law Rep. 2 C. P. 348.
(2) 3 B. & P. 582.
(3) 2 E. & B. 364.
(4) 3 H. & N. 484; 27 L. J. (Ex.) 372; s. c. in Ex. Ch. 4 H. & N. 822; 29 L. J. (Ex.) 6.

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pass, and the liability to pay for them could not arise. Under these circumstances, I do not see how the plaintiffs can sue him on his promise to bear all risks and dangers of the seas. That clause may exonerate the vendors from any possibility of being sued for non-delivery, but it does not increase or accelerate the defendant's liability to pay the value of the goods, or to compensate the vendors, by paying a sum equal to their value, for the loss of the goods during the voyage.

CHANNELL, B. I am of the same opinion. The question is simply as to what is the true construction of the agreement declared on, which is not, it should be observed, for insurance but for purchase. Now it is clear that until the cargo was delivered, the time to pay for it had not arrived. But then there is a clause imposing on the purchaser all risks and dangers of the seas which should occur after the receipt by him of the bills of lading. We cannot strike these words out of the agreement, but must affix some meaning or other to them. I think they are sufficiently explained and satisfied by holding that they removed the defendant's right, after receipt of the bills of lading, to sue the plaintiffs for non-delivery of the cargo. They do not appear to me to require such a construction as the plaintiffs contend for; a construction which would accelerate the defendant's liability to pay the value of the goods, whether they arrived or not, in a manner not in my judgment contemplated by the agreement.

CLEASBY, B. I very much regret that I feel constrained to differ from my learned Brothers, but after the best consideration I can give to this agreement, I think that judgment should be given for the plaintiffs, and that the defendant ought to bear the loss which has occurred through the risks and dangers of the seas. In other words, it seems to me that he must pay the value of the goods to the plaintiffs. The agreement contemplates two separate and distinct events,—first, the loss of the vessel, and, secondly, her safe arrival; and I do not think that we can—these two perfectly distinct events being contemplated in the agreement—assist ourselves by the language used in the part of the agreement framed on the assumption that the vessel will arrive, in construing that

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part of it which is framed on the assumption that she will be lost. Although it is a sound rule that a contract must be construed as a whole, still that rule has no useful application where different parts of the same contract are drawn up to meet different and incompatible sets of circumstances. Now, acting on this principle, and looking at so much of the agreement as concerns the obligations of the parties in case the vessel is lost, what is the object of the clause imposing on the purchaser, upon his receipt of the bills of lading, all risks and dangers of the seas? I read it as indicating whose duty it was to insure the goods. The vendors performed their part of the contract by shipping and despatching the goods, and forwarding the bills of lading. On receiving them, the purchaser in terms undertakes all future risk, and he could and ought then to have insured against those risks if he desired to protect himself from possible loss. I am of opinion, therefore, that he is liable in this action to the vendors for the loss which happened through risks and dangers of the seas, which are admitted on these pleadings to be within the meaning of the agreement.

Judgment for the defendant.

Attorneys for plaintiffs: *Lumley & Lumley.*
Attorney for defendant: *E. C. Morley.*

FAIRLIE *v.* FENTON AND ANOTHER.

April 26.

Principal and Agent—Broker—Contract of Sale.

A broker cannot sue in his own name upon contracts made by him as broker.

The plaintiff, a broker, signed and delivered to the defendants a bought note for cotton in the following form, "I have this day sold you on account of T., &c. (Signed) E. F., broker":—

Held, that he was not a contracting party, and could not sue the defendants for breach of the contract in refusing to accept the cotton. (1)

ACTION for the non-acceptance of cotton, tried before Kelly, C.B., at Guildhall, on the 10th of December, 1869.

The contract sued on was one made by bought and sold notes, signed by the plaintiff, a broker in the city of London. The

(1) See *Paice* v. *Walker*, post, p. 173.

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bought note was in the following words:—"London, Aug. 20, 1869.—Messrs. J. & R. Fenton, per Messrs. Ronaldson and Stringer. I have this day sold you on account of Mr. Illins A. Timmins, of Manchester, to arrive in Liverpool per *Evelyn*, from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed, 100 bales Omrawattie cotton, on the basis of 10¾*d.* per lb. for fair. No allowance to sellers, but in case of inferiority of quality the cotton to be taken by the buyers at an allowance to be settled by arbitration in the usual manner. To be taken from the warehouse. Any slight variation in marks not to vitiate the contract. Brokerage, per cent. (Signed) Evelyn Fairlie, broker."

The plaintiff obtained a verdict for 1748*l.*, leave being reserved to the defendants to move to enter a nonsuit, on the ground that the plaintiff only made the contract as broker, and was himself no party to it. A rule having been obtained accordingly,

Pollock, Q.C., and *Barnard*, shewed cause. The plaintiff was himself a contracting party. There is nothing in the fact that a man is acting as agent to prevent him from contracting in his own name, and the use of the words "I have," shews that he was here doing so: *Sargent* v. *Morris* (1); *Parker* v. *Winlow* (2); *Tanner* v. *Christian* (3); *Lennard* v. *Robinson* (4); *Mahony* v. *Kekulé*. (5) Moreover, as a rule, a broker, like an auctioneer, can sue in his own name upon contracts made by him for his principal: *Williams* v. *Millington* (6); Chitty on Pleading, 7th ed. vol. i. p. 8.

[MARTIN, B., referred to Lush's Practice, vol. i. p. 11 (3rd ed.).]

Brown, Q.C., and *Mellor*, in support of the rule. The case of an auctioneer is wholly distinct from that of a broker. His right to sue, like that of a factor, rests upon his interest in the contract, and his lien on the goods and on their price. This is clearly shewn in *Williams* v. *Millington* (6); *Robinson* v. *Rutter* (7); and *Fisher* v. *Marsh* (8);

(1) 3 B. & A. 277, per Bayley, J., at p. 280.
(2) 7 E. & B. 942; 27 L. J. (Q.B.) 49.
(3) 4 E. & B. 591; 24 L. J. (Q.B.) 91.
(4) 5 E. & B. 125; 24 L. J. (Q.B.) 275.
(5) 14 C. B. 390; 23 L. J. (C.P.) 54.
(6) 1 H. Bl. 81.
(7) 4 E. & B. 954; 24 L. J. (Q.B.) 250.
(8) 6 B. & S. 411; 34 L. J. (Q.B.) 177.

which are all expressly based upon that ground. But a broker has no possession of the goods, and no lien on them or on the price, and has no right to sell in his own name or to receive payment. The case is therefore left to the general principle laid down by Blackburn, J., in *Fisher* v. *Marsh* (1), that where the principal's name is disclosed in a contract made by the agent, the principal only can sue, unless the agent, by distinct words, makes the contract his own. Here, on the contrary, the plaintiff both names his principal and signs as broker, the inference from which is that he acted merely as agent. The case is directly within the authority of *Bramwell* v. *Spiller* (2), and the only words in the contract which appear to lead to an opposite conclusion, "I have sold, &c.," are shewn by *Fawkes* v. *Lamb* (3) not to have any such operation.

KELLY, C.B. The numerous cases cited to us shew that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as broker. He may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue, but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal, no action is maintainable by him. Though innumerable contracts of this nature daily take place, yet no instance has occurred within my own recollection, nor has any instance been cited to us, where an action has been brought by a broker describing himself as such in the contract, and not using words which expressly or by necessary implication make him the contracting party. Without further arguing the point, it is enough to refer to this unbroken rule as the settled law upon the subject.

MARTIN, B. I am of the same opinion, though I had certainly been under the impression that a broker could sue in his own name. I find that it is so laid down in Chitty on Pleading, vol. i. p. 8. It was also so stated in Hammond on Parties (4), an extremely able work, from which the statement was probably

(1) 6 B. & S. at p. 416; 34 L. J. (Q.B.) at p. 178.

(2) 21 L. T. (N. S.) 672.

(3) 31 L. J. (Q.B.) 98.

(4) Hammond's Practical Treatise on Parties to Actions and Proceedings, Civil and Criminal, and of rights and liabilities with reference to that subject. 8vo. 1817.

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adopted by Mr. Justice Lush into his very valuable book of Practice (Lush's Practice, 3rd ed. p. 11). My opinion was probably founded on those authorities, and on a general notion that a broker had an interest in the contract which entitled him to maintain an action. But that can only be where he has such an interest in fact; and I am entirely satisfied, even without authority, that when he states on the face of the contract that he is acting as broker, that is, as a middle-man between the two parties, he has no interest, and cannot sue. If he could sue, he could also be sued; and it is obvious on the face of the contract that he does not contract to deliver the goods sold, but only that he has authority to enter into the contract on behalf of the principal he names. The words "I have," are of no importance to shew him a contracting party.

PIGOTT, B. I am of the same opinion. On the plain construction of the contract the plaintiff is no party to it; but only signs, as broker, bought and sold notes for the respective parties. *Baring* v. *Corrie* (1) shews the difference between the position of a broker and a factor, and that the broker has no right to sell in his own name; in the present case, I do not think that he has, in fact, done so.

CLEASBY, B. I am of the same opinion. There is no doubt a broker cannot sue; he has no authority to sell in his own name, or to receive the money, and has nothing to do with the goods. This is so laid down in Story on Agency, ss. 28—34, 109:—"To use the brief but expressive language of an eminent judge, 'a broker is one who makes a bargain for another, and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. When he is employed to buy or to sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name." (s. 28). "So, a broker has ordinarily no authority virtute officii, to receive payment for property sold by him." (s. 109). The distinction between a broker and an auctioneer has been already pointed out in argument. My only doubt has been whether the

(1) 2 B. & A. 137.

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use of the words "I have," &c., ought to be held to import a personal participation in the contract, the usual course being departed from; but my opinion is, it ought not. The form is also in some other respects a little peculiar, as in its reference to the rules of the Cotton Brokers' Association; but it has not been shewn that those rules treat the broker as a principal in the transaction. The rule must, therefore, be made absolute.

Rule absolute.

Attorneys for plaintiff: *Phillips & Willicombe.*
Attorneys for defendants: *Walker & Sons.*

PAICE *v.* WALKER AND ANOTHER.

April 29.

Principal and Agent—Agent signing Contract in his own Name—Foreign Principal.

A person signing a contract in his own name, without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words expressly or by necessary implication shewing that he only signs as agent.

The defendants signed a contract for the sale of wheat in the following form:—"Sold A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig), &c. (Signed) Walker & Strange:"—

Held, that they were personally liable upon the contract. (1)

ACTION for the non-delivery of wheat according to sample, tried before Kelly, C.B., at Guildhall, on the 11th of December, 1869. The contract sued on was contained in two notes signed respectively by the defendants and the plaintiff.

The first was as follows:—"1, Muscovy Court, Trinity Square, E.C., London. 18th of June, 1869. Sold A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig), similar to sample 94 at time of shipment, due allowance being made for size, handling, and time out of bulk, at the price of 50*s.* (say fifty shillings) per 496 lbs., free on board at Danzig, and including freight and insurance (exclusive of war risk) to London. Shipment by steamer as soon as suitable room can be obtained. Mats to be left on board. Sellers not to be responsible for the

(1) See *Fairlie* v. *Fenton*, ante, p. 169.

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solvency of the underwriters. Full out-turn guaranteed (sea accident excepted, in which case sellers' invoice is final). Excess or deficiency to be paid for reciprocally. Payment by buyer's acceptance to sellers' drafts for invoice amount at two months from date of and against bill of lading, less interest of one month, or cash less interest for the unexpired term of three months, both at 5*l.* per cent. (Signed) Walker & Strange."

The note signed by the plaintiff was in the same terms, commencing "London, 18th June, 1869. Bought of Messrs. Walker & Strange, London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig), &c. (Signed) A. J. Paice."

The defendants afterwards drew, in their own name, on the plaintiff for the price, and the defendants accepted, and at maturity paid the draft. The wheat was delivered, but was not equal to sample.

The plaintiff obtained a verdict for 46*l.*, leave being reserved to the defendants to move to enter a nonsuit, on the ground that the defendants acted only as agents in making the contract, and were not personally bound by it. A rule having been obtained accordingly,

Murphy and *Pollock, Q.C.*, shewed cause. The defendants here have signed in their own name without any qualification, and not as agents; the mere fact that they say elsewhere in the contract that they are agents for another is not sufficient to alter the effect of their signature: per Lord Campbell, C.J., in *Parker* v. *Winlow.* (1) The rule is so laid down in 2 Smith L. C. (6th ed.) p. 344, and is supported by all the cases, there being none where a person signing without any qualification has been held exempt from liability on the contract, unless by clear words in the body of the contract it was stated that he acted only as agent: *Lennard* v. *Robinson* (2), *Tanner* v. *Christian.* (3) The true intention of the parties here is shewn by the defendants drawing on the plaintiff in their own names.

[CLEASBY, B. The defendants appear by the contract to have acted for foreign principals.]

(1) 7 E. & B. at p. 947; 27 L. J. (Q.B.) at p. 52. (2) 5 E. & B. 125; 24 L. J. (Q.B.) 275. (3) 4 E. & B. 591; 24 L. J. (Q.B.) 91.

Dowdeswell, Q.C., and *Day*, in support of the rule. The description of the defendants as the agents in the body of the contract excludes their liability as principals. The principle on which the Court decided *Fairlie* v. *Fenton* (1) governs this case, and is supported by *Downman* v. *Jones* (2); *Lewis* v. *Nicholson* (3); *Spittle* v. *Lavender* (4); *Green* v. *Kopké* (5); *Randell* v. *Trimen* (6); *Mahony* v. *Kekulé* (7); *Deslandes* v. *Gregory* (8); *Kelner* v. *Baxter*. (9) Considering the brevity of mercantile instruments, any words indicating the intention of the parties will be held sufficient, and a formal statement of agency is not required.

KELLY, C.B. The question is, whether the defendants are personally liable upon this contract, and I am of opinion that they are. Although it may be difficult to reconcile, I do not say all the cases, but all the dicta in the cases upon this subject, there is no difficulty in extracting from the authorities a very sound rule, and one on which we can always safely act. That rule is well laid down in the note to *Thomson* v. *Davenport*, in 2 Smith's Leading Cases (6th ed.), p. 344, in these terms: "It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is primâ facie to be deemed to be a person contracting personally; and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." Now, to apply that rule to the present case; the contract is here signed "Walker & Strange" without more, therefore without any such qualification as is referred to in the rule I have cited, and that circumstance disposes of the many cases adverted to by Mr. Dowdeswell, in which the contract was signed by a person describing himself *in the signature, and as part of it*, as agent. That the incorporation of such words with, or their annexation to, the signature is the qualification referred to in the first part of the passage

(1) Ante, p. 169.
(2) 7 Q. B. 103.
(3) 18 Q. B. 503; 21 L. J. (Q.B.) 311.
(4) 2 B. & B. 452.
(5) 18 C. B. 549; 25 L. J. (C.P.) 297.
(6) 18 C. B. 786; 25 L. J. (C.P.) 307.
(7) 14 C. B. 390; 23 L. J. (C.P.) 54.
(8) 2 E. & E. 602, 610; 30 L. J. (Q.B.) 36.
(9) Law Rep. 2 C. P. 174.

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I have cited, is shewn by the conclusion of the sentence, where "the other portions of the document" are contrasted with the signature itself. The defendants therefore not signing as agents, is there anything in the contract to bring them within the latter part of the rule I have referred to, and to which I entirely accede, that is, is there anything in the document to shew that the defendants did not intend to bind themselves otherwise than as agents? The words relied upon to shew this are the words, "as agents for J. Schmidt & Co., of Danzig." But numerous cases, and amongst them that of *Lennard* v. *Robinson* (1), have decided that the use of these words in the body of the contract does not prevent the liability of a party who signs as principal.

The rule, therefore, stands thus, that where a contract is signed by a person without any words importing agency, the person so signing is by virtue of the contract both entitled and liable, unless in the body of the contract a contrary intention is clearly shewn. The contract before us is so signed, and there is nothing tending to shew a contrary intention, except words which, on the authority of decided cases, have not that operation.

In dealing with the case, I do not rely on the circumstance that the alleged principals appear on the face of the contract to be foreigners resident abroad. Where that circumstance appears in the contract it may or may not have the effect contended for. I place no reliance on it. Nor do I rely on what afterwards passed between the parties, by which it appears that the defendants, so far from denying that they were parties to the contract, acted as sellers by drawing upon the plaintiff in their own name. I refer to it only to shew that our decision is in conformity with the justice and expediency of the case, not less than with strict law.

MARTIN, B. I am of the same opinion; and I adopt the rule laid down in the original text of Mr. Smith's work, which my Lord has already referred to. The document here in question is signed "Walker & Strange," without the addition of any such words as "agents," or any qualification whatever. Therefore, upon the rule so laid down, the defendants are, primâ facie, the persons contract-

(1) 5 E. & B. 125; 24 L. J. (Q.B.) 275.

ing. It is, therefore, unlike the case of *Fairlie* v. *Fenton* (1), where the plaintiff signed as broker. Nor is it, as that was, the case of a contract made by bought and sold notes through a broker, whose trade and occupation is that of a middle-man; but each part of the contract is signed by the party who delivered it. Is there, then, anything in the body of the contract from which it appears that the defendants did not mean to bind themselves as principals? So far from that being the case, I infer from the form of the contract that their intention was directly the contrary, that they did mean to be contracting parties, and that the name of their foreign principals was inserted merely as a notice to the other contracting party, or an earmark of the contract to distinguish it as one made by them in pursuance of their commission or agency.

PIGOTT, B. I am of the same opinion. I adopt the rule laid down by my Lord and my Brother Martin, and think the case quite distinguishable from that of *Fairlie* v. *Fenton*. (1) In *Tanner* v. *Christian* (2), Crompton, J., says, "In each case of this kind we must look to the terms of the particular instrument, and discover from them what the parties intended;" he adds that Christian "signs it in his own name." In *Cooke* v. *Wilson* (3), Cresswell, J., concurs in this view, and after pointing out how contracts may be signed so as to prevent the agent from being liable upon it, says, "Primâ facie, when a man signs a contract in his own name, he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him." That applies to the present case. Then, is there anything in the body of the contract to relieve the defendants from their liability? The words relied on are, "as agents for John Schmidt & Co., of Danzig." Now, in *Lennard* v. *Robinson* (4), it was said by Coleridge, J., that the fact that the defendants were acting for a foreign principal was a circumstance to be taken into consideration. In my judgment, taking into consideration that circumstance, which also appears in this contract,

(1) Ante, p. 169.
(2) 4 E. & B. at pp. 597-8; 24 L. J. (Q.B.) at p. 94.
(3) 1 C. B. (N. S.) 153, 162.
(4) 5 E. & B. at p. 131; 24 L. J. (Q.B.) at p. 277.

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and the further fact that the cargo is to be taken, not at Danzig, but at London, and considering also that the defendants were not, as in the case of *Fairlie* v. *Fenton* (1), acting as brokers and making a contract for both parties by bought and sold notes, the defendants must be held on the true construction of the contract to have contracted personally with the plaintiff. Mr. Dowdeswell founds an argument on the brevity of mercantile documents; but, as is said by Cresswell, J., in the case I have referred to, nothing can be an easier or shorter expression of intention than to sign the contract as agents, if they mean to exclude liability as contracting parties.

CLEASBY, B. I am of the same opinion. I do not object at all to the view expressed by the rest of the Court, but I am not disposed to reject or to give less than considerable weight to the fact that this contract shews on the face of it that it was made on account of a foreign principal. It is laid down in Buller, N. P., p. 130, that "where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise will be presumed to be made to him, and the rather so as it is much for the benefit of trade;" the author only qualifies this by adding that there is nevertheless a contract also with the principal. In an old case of *De Gaillon* v. *L'Aigle* (2), Eyre, C.J., says, "I am not aware that I have ever concurred in any decision in which it has been held that if a person, describing himself as agent for another residing abroad, enters into a contract here, he is not personally liable on the contract." The same view is adopted and expressed in Story on Agency, ss. 400, 401, and in Smith's Mercantile Law, p. 164 (7th ed.). Suppose that the present case were one in which the defendants had in a similar form contracted to buy, and were suing the seller in their own names for non-delivery, would it be possible to hold them not entitled to sue? It may be said this is idem per idem, and it is so; but the case I put is somewhat more obvious. If the principles I have referred to are applied here, the defendants, who have signed in their own name without any

(1) Ante, p. 169. (2) 1 B. & P. 368.

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qualification, must be held to have contracted personally. The words "as agents for J. Schmidt & Co., of Danzig," have a sufficient meaning if we take them to be inserted for the purpose of giving notice to the buyers that the defendants were acting for those foreign principals, if for any purpose it should become necessary to refer to them.

Rule discharged.

Attorneys for plaintiff: *Hilleary & Tunstall.*
Attorneys for defendants: *Denton, Hall, & Barker.*

KREUGER AND ANOTHER *v.* BLANCK.

May 10.

Contract of Sale—Construction—"Cargo."

The defendant ordered of the plaintiffs "a small cargo (of lathwood) of about the following lengths, &c., in all about sixty cubic fathoms," and the plaintiffs accepted the order. The plaintiffs not being able to procure a vessel of the exact size, chartered a vessel to the defendant's port loaded with eighty-three fathoms. On the arrival of the vessel the plaintiffs' agent unloaded, measured, and set apart timber to answer the defendant's order, and tendered him a bill of lading for that quantity, and a draft for acceptance; but the defendant declined to accept on the ground that the cargo was in excess of the order. In an action for non-acceptance of the goods:—

Held (per Kelly, C.B., and Cleasby, B.; Martin, B., dissenting), that "cargo" meant a whole cargo, and not a parcel of a cargo, and that the plaintiffs had not complied with the order so as to entitle them to maintain the action.

ACTION for non-acceptance of timber. The second plea traversed the plaintiffs' readiness and willingness to deliver.

The plaintiffs were timber merchants at Calmar, in Sweden; the defendant a merchant at Gloucester.

In answer to a letter from the defendant inquiring prices, &c., the plaintiffs, on the 7th of August, 1869, replied:—"We shall, with pleasure, be willing to deliver one or two cargoes of lathwood to the Bristol Channel at 6*l.* 15*s.* per cubic fathom. Our stock for the present consists of the following lengths, . . . and you might yourself select therefrom a cargo suitable for you."

On the 14th of August the defendant wrote:—"Our place is, in truth, overstocked, and there is little prospect of sale; but in

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acknowledgment of your offer, I cannot forbear to address you an order for a small cargo of about the following lengths:

$$\frac{10/15 \text{ fath.}}{8 \text{ ft.}} \quad \frac{10}{7 \text{ ft.}} \quad \frac{20}{6 \text{ ft.}} \quad \frac{10}{4\frac{1}{2} \text{ ft.}} \times \frac{10 \text{ fathoms.}}{4 \text{ feet.}}$$

in all about sixty cubic fathoms, which you will please to effect on opportunity for my account, at 6*l.* 15*s.* c. f. and i. per cubic fathom, discharged to the Bristol Channel. The quality must be prime, and the measurement guaranteed. On receipt of bill of lading and policy of insurance, I will return to you my acceptance at four months, domiciled with the Union Bank of London as before."

On the 19th of August the plaintiffs answered, acknowledging the letter of the 14th, and saying: "We thank you for the order therein given us for a cargo of lathwood, which we will execute as exactly as possible as soon as a vessel can be obtained . . . If you could give us a fixed destination, it would facilitate the engagement of the vessel; otherwise, we presume that Penarth Roads is to be called at for orders to discharge in a good port in the Bristol Channel. We have already looked out for a vessel, and as soon as we succeed in getting one suitable for your order, we shall have the pleasure to inform you."

On the 31st of August the defendant wrote: "I shall be glad if the clause, 'Penarth Roads for orders to a good port in the Bristol Channel,' can be stipulated; but should there be difficulties, you may order the ship direct to Gloucester."

On the 6th of September the plaintiffs wrote: "It is very difficult to get a suitable vessel for the lathwood in question, as they are either too large or too small; but should you be willing to allow us to increase the lot by ten to twenty fathoms, we have a vessel which is going to Penarth Roads for orders to discharge in a good port in the Bristol Channel."

On the 10th of September the defendant wrote, stating that the market was depressed, and requesting the plaintiffs to consider the order as annulled if not already executed.

On the 13th of September the defendant wrote again in reply to the letter of the 6th, then received, requesting the plaintiffs to "consider my order for a cargo of lathwood as annulled for this season."

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On the 16th of September the plaintiffs, replying to the letter of the 10th, refused to annul the order, "as we have already chartered the vessel *Scandia*;" and inclosed the charterparty.

On the 21st of September the defendant wrote: "Gladly as I would suit you by taking the cargo out of your hands, I much regret that it is not possible for me to do so, as my buyer, as I have already informed you, does not think of more lathwood for this year. Had the charterparty not been closed on the 1st of September, and the cargo offered to another house, as it was known here a fortnight ago that the *Scandia* was chartered to this place, and the size in conformity with his order, the cargo would have been received by him; as it is, he refuses it."

On the 23rd of September the plaintiffs wrote, refusing to cancel the order: "Naturally, we cannot demand that you should receive a larger quantity than you ordered, but it does not appear that you can, with honour, get free from receiving that . . . *Scandia* will soon be ready to sail."

On the 27th of September the plaintiffs wrote, in reply to the defendants' letter of the 21st: "We have not offered *Scandia's* cargo for sale, and as no other vessel could be obtained, we have availed ourselves of this opportunity to send you the quantity requested. We do not see that we have in any way transgressed your order."

The *Scandia* arrived at the port of Gloucester on the 1st of November, with eighty-three fathoms of lathwood on board; the plaintiffs' agent unloaded the cargo, and measured and set apart the amount of the defendant's order, and tendered to the defendant a bill of lading and policy of insurance for that quantity, and a draft for the defendant's acceptance. The defendant would not accept the timber or the bill, and the plaintiffs were compelled to sell the timber at a loss of 142*l*. Thereupon they commenced this action.

The cause was tried before Martin, B., at the Gloucestershire spring assizes, 1870, and a verdict was found for the plaintiffs for 142*l*., with leave to the defendant to move to enter it for him on the ground that the contract was for a cargo and not for a parcel. A rule having been obtained accordingly,

Powell, Q.C., and *Macnamara*, shewed cause. The meaning of the parties was satisfied by what was done. The word *cargo* in

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the correspondence is merely descriptive, and is not used as a definition of the subject-matter of the contract. That is defined by the quantities and the kind of wood; and provided the plaintiffs make a delivery otherwise in substantial conformity with the terms of the letter of the 14th of August, the defendant cannot reject it merely because other timber accompanies it to the port in the same vessel. If he could, then he could equally reject it if other cargo of a wholly different kind was on board, such as corn or flax; or if it came in two vessels instead of one, though filling the whole of each. There is nothing in the contract to justify the Court in inserting such a stipulation or collateral warranty, which is resorted to only for the purpose of evading performance of the contract upon a fall in the market. If the defendant sought to put such a meaning on the word, he should have appealed to the jury, who are the proper tribunal to determine in such a case the signification of the term *cargo*: *Houghton* v. *Gilbart.* (1)

[KELLY, C.B., referred to *Sargent* v. *Reed.* (2)]

Butt, Q.C., and *Griffits*, in support of the rule. The case referred to by the Lord Chief Baron shews the true construction of this contract. Cargo does not mean a parcel of a cargo, but the entire freight of the vessel; and the plaintiffs have not, therefore, been ready and willing to perform their part of the contract. The distinction is one of substance. The whole cargo might be detained for a general lien for freight, whereas the defendant ought to be able to obtain his order on payment of his freight alone. He ought also to have his order completed by the sellers, and not to be left to the discretion of the sellers' agent in selecting what he is to have. This would become the more important if, as might well happen, a portion of the cargo were damaged in a storm; whose would be the loss? Or, if a part were lost, whose would the residue be? A small vessel might be able to come alongside and give delivery at the wharf; a larger one might be obliged to discharge at sea by means of lighters; and why should the defendant be put to this extra expense? Difficulties might also arise with respect to insurance, and when a loss had occurred, it would be difficult to know who was entitled to claim. It is for the very purpose of avoiding all these difficulties that whole cargoes are ordered,

(1) 7 C. & P. 701. (2) 2 Str. 1228.

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CLEASBY, B. I think this rule should be made absolute; for, in my opinion, the defendant did not get what he contracted for, or anything that can be properly called an equivalent. In the letter of the 14th of August, which principally contains the terms of the contract, the defendant states the lengths and quantity of timber he requires; and with respect to the longest length he gives as the quantity, ten to fifteen fathoms, but as to the other lengths he gives only one fixed number of fathoms for each length. These quantities make a total of from sixty to sixty-five fathoms, and having thus described the timber, he orders "a small cargo . . . in all *about* sixty cubic fathoms," apparently anticipating that he could not expect to have an exact quantity sent him, and providing for a margin of five fathoms in the quantity of the longest lengths, which corresponds with the margin of five fathoms in the total of sixty to sixty-five fathoms.

Now, the contract being contained in these letters, and the question turning on the construction of them, we must abide by the natural meaning of the terms used, unless some exceptional meaning is proved; and we cannot rely on any supposed inconvenience arising from that construction, unless some ambiguity or difficulty in the meaning of the words has first been pointed out. What, then, does the word "cargo" mean? It means the cargo of the ship, that is, what is put on board the ship, or what the ship carries. If I were myself of a different opinion, I would not be guided by the meaning given in dictionaries; but I find in Webster's Dictionary cargo defined as "the lading or freight of a ship; the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel;" and Richardson gives its meaning as "the freight or lading of a ship." The question as to the meaning of the same word arose also in the case of *Sargent* v. *Reed* (1), to which my Lord has referred, where the point arose on a motion in arrest of judgment, and a legal exposition of the word used in the declaration was therefore required. It was there argued that the word was uncertain and might mean only a small parcel of goods on board, but the Court said that "the word *cargo*, as referred to a ship, was very intelligible, and must mean the whole loading. It may as well be said that the word *ship* is uncertain, one being much bigger

(1) 2 Str. 1228.

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than another." This case was referred to in *Houghton* v. *Gilbart* (1), where the question as to the meaning of the word was left to the jury; but that was an action on a policy of insurance on cargo, which would not necessarily be on the whole, and it would therefore be a question for the jury what part of the cargo was insured. Moreover, it is evident that mercantile usage was there appealed to, for the marginal note runs thus: "A general dictionary of the English language is not authority to shew, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage."

Here, however, on my own reading of the word, and upon authority, I think it means the whole cargo. That impression is strengthened by the correspondence, and especially by the letters of the 14th of August and the 6th of September, in which the parties evidently translate the word in that sense; the plaintiffs do not themselves think, at the time they write the last-mentioned letter, that they have a cargo in the proper sense of the word.

If, however, the defendant had got an exact equivalent of what is so described, I should be anxious to give effect to the plaintiffs' act as a performance of the contract. But, when we consider the matter, we find the two things are substantially different. In the one case he gets the whole cargo as it has been selected and shipped by the plaintiffs; in the other, he must take delivery according to a selection to be made at the end of the voyage, either by himself—no right to select however being given him—or by some third person as agent for the sellers. So also, if damage had happened to the cargo, there would be nothing to shew whose timber was damaged, whether the defendant's timber or that which formed the residue of the cargo. And, again, the defendant might be required to pay freight for the whole cargo, before he could obtain possession of what was his own.

I am the less unwilling to put this construction on the contract, from the fact that the timber was forwarded, after the letters were written which shew the construction put by the parties themselves on the contract, and after the plaintiffs were informed of the depressed state of the market.

(1) 7 C. & P. 701.

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MARTIN, B. I think the rule should be discharged. The order was, in substance, for about sixty fathoms of lathwood of a certain quality and price, and timber of that quantity and quality has been offered to the defendant. He rejects it, because with that timber twenty other fathoms of timber were also sent in the same ship. He seeks, therefore, to construe the contract as if it contained the term, that if any other wood were brought in the same vessel with it, he might reject the timber, though in every respect according to the contract. I do not read the letter of the 6th of September as if the plaintiffs thought it necessary that the timber should come in one vessel, or without any other cargo accompanying it I cannot see that the defendant can reject it because other timber accompanied it, more than if cargo of a wholly different kind, such as sugar or cotton, had been on board. It appears to me that the defendant is asking us to introduce a proviso into the contract which is not contained in it, for the purpose of enabling him to repudiate a contract in a falling market.

KELLY, C.B. I certainly regret much, if there was any evidence of a custom of trade which could have thrown light upon the meaning of the term used, that that evidence was not given; but having the contract before us to interpret, we must construe it according to the natural meaning of the words, and the correspondence between the parties. Now, throughout the letters, beginning with that of the 14th of August, which contains the original order, the subject of the contract is described, not as a quantity or a parcel, but as a cargo of about sixty fathoms. This is clear and umambiguous; and the question then arises whether, inasmuch as the plaintiffs have offered to deliver, not a cargo, but only part of a cargo of the amount specified, that is a performance on their part of the contract which enables them to maintain this action. Is it the thing contracted for? Not certainly in terms; and it therefore lies on the plaintiffs to shew that it is the same in fact and substance. It may sometimes be, and perhaps in this case it was, the same in substance, but when we are asked to say that a part of a cargo is the same as a whole cargo, we must consider whether in all cases it would be the same, independently of any particular facts and circumstances. Now, it is clear there might be a substantial

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difference. There might be a general lien for freight upon the whole cargo, which the defendant might be compelled to satisfy, though interested only in part of the cargo. There might be a dispute as to quality arising out of the mixture of the defendant's timber with other timber brought by the same vessel. Part of the timber shipped in one entire bulk might be lost in a storm, and a question would then arise as to whose was the timber that was lost, and whose was saved; and, as between two different sets of underwriters, which was liable to make good the loss. But the construction of the contract must be uniform, and cannot be affected by circumstances peculiar to some cases. It is, therefore, quite enough to say that a cargo, and a parcel of a cargo, are different in terms, and may be different in substance. I am satisfied, also, that in putting this construction on the contract, we are giving it the meaning attached to it by the parties themselves, and that we cannot read the letter of the 6th of September, as meaning anything else than that the plaintiffs supposed an entire cargo was to be delivered.

Rule absolute.

Attorneys for plaintiffs: *Rogerson & Ford, for R. Smith, Gloucester.*

Attorneys for defendant: *Druce, Son, & Jackson.*

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April 28.

Trespass—Assault—Action by Husband against Lessee of Wife—Separate Estate—Equitable Plea—Practice in Equity in restraining an Action of Assault.

To a declaration for, first, trespass to land; secondly, wrongful conversion of certain goods; thirdly, assault; the defendant pleaded, on equitable grounds—first, to the first count, that the plaintiff's wife was seised for her life of the land in that count mentioned, and being so seised was married to the plaintiff, whereby her estate in the land became vested in her and the plaintiff in her right; and afterwards by deed duly acknowledged the plaintiff and his wife granted the land to E., his heirs, &c., to hold the same, during the life of the plaintiff's wife, unto E., his heirs, &c., to the use of the plaintiff's wife and her assigns, to the intent that she and they should receive the rents thereof for her sole and separate use; that afterwards the plaintiff's wife let the said land to the defendant, and he entered and occupied under that lease, and that the alleged trespasses are his entry upon and occupation of the land under the terms of the lease. Secondly and thirdly, similar justifications to the counts for trover and assault:—

Held, good pleas, inasmuch as in equity the plaintiff had no more right than a mere stranger to interfere with the wife's lessee.

DECLARATION: First count, for trespass to a house, garden, and fields; second count, for the wrongful conversion of certain goods, i.e., hay, clover, and vetches, and garden crops, tools and implements; third count, for an assault.

Fourth plea: On equitable grounds to the first count, that one Mary Heath, now Mary Allen, the wife of the plaintiff, was seised of the said house, garden, and fields in the first count mentioned, for an estate for her natural life, and afterwards, &c., the said Mary, so being seised of the house, garden, and fields, became the wife of the plaintiff, whereby the estate of Mary became vested in her and in the plaintiff in her right, and afterwards, &c., by deed dated the 8th of December, 1866, and made between the plaintiff and Mary his wife of the one part, and one Nathaniel Edwards of the other part, the plaintiff and the said Mary granted, released, and conveyed unto Nathaniel Edwards, his heirs and assigns, certain lands and premises therein described, and among others, the said house, garden, and fields, to have and to hold the same during the life of the said Mary unto Nathaniel Edwards, his heirs and assigns, *to the use of* the said Mary and her assigns, to the intent that she and they should receive the rents, issues, and profits thereof as and when the same

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should become due and payable from time to time for her own separate and peculiar use and benefit, independently and exclusive of her then or any future husband with whom she might intermarry, and without being in anywise subject or liable to his or their debts or control, interference and engagements, her receipt or receipts in writing, notwithstanding her present or any future coverture, to be alone a good and sufficient discharge, or good and sufficient discharges, for the same from time to time; that the deed was duly acknowledged by the said Mary, pursuant to 3 & 4 Wm. 4, c. 74; that she, by an agreement in writing signed by her, and made between her and the defendant on the 28th of May, 1869, demised the said house, garden, and fields, as and being part of her separate estate, unto the defendant, to hold the same as tenant from year to year from the 25th of March then last past, at a certain rent and on certain terms then agreed upon between them, and the defendant thereupon entered on and took possession of the said house, garden, and fields under the agreement and demise, and the defendant always paid the rent to the said Mary as agreed, and performed all the terms on his part to be performed; that the defendant's interest under the demise in the said house and garden has never been determined, but is still subsisting, and that the trespasses and acts complained of in the first count herein pleaded to are the defendant's entering on and holding possession of the said house, garden, and fields under and according to the terms of the said agreement and demise, and not otherwise.

Fifth plea: On equitable grounds to the second count, repeating the statements in the last preceding plea contained, and further saying that the goods in the second count mentioned were certain crops growing on, and certain fixtures erected on and affixed to the house and lands in the last plea mentioned; and that the defendant, during the continuance of the demise and agreement took and held the said crops and used the said fixtures, under and according to the terms of the demise and not otherwise, which are the acts in the said second count complained of.

Seventh plea: On equitable grounds to the last count, repeating the allegations in the fourth plea contained, and further saying that at the times when, &c., in the last count mentioned, the plaintiff had

entered and was on the lands and premises in that plea mentioned, and was endeavouring to interfere with the defendant's lawful enjoyment thereof, and to eject the defendant therefrom, whereupon the defendant requested the plaintiff to leave the said lands and premises, and to desist from so endeavouring as aforesaid, which the plaintiff refused to do, whereupon the defendant gently laid his hands on the plaintiff in order to remove him, doing no more than was necessary, &c., which are the assaults pleaded to.

Replication on equitable grounds to the several pleas, that from the time of the making of the said deed, which was made on or about the 8th of December, 1866, for a long time thereafter, and until the time of the making of the said agreement, which was made on or about the 28th of May, 1869, he, the plaintiff, did, along with his said wife, dwell in the said house and occupy the same house and the said garden and fields therewith, and during all that time cultivated and cropped the said garden and fields, and by such cultivating and cropping raised thereupon the crops in the declaration mentioned, being annual crops grown by the plaintiff's industry, and took the profits and outgoings of the said house, garden, and fields for their and his own use, and was rated, taxed, and charged with, and duly paid, all rates, taxes, and charges imposed and payable in respect of the said house, garden, and fields, and that the possession of the plaintiff at the several times when, &c., was a continuance of the possession aforesaid; and that neither he, the plaintiff, nor Nathaniel Edwards, ever signed or assented to the said agreement, or ever authorized or assented to the alleged demise to the defendant, or to the entry of, or taking possession by, the defendant, in the several pleas mentioned, or to any of the payments by the defendant in the pleas mentioned respectively.

Demurrers to the pleas and to the replication, and joinders in demurrer.

April 27. *C. Hutton*, for the plaintiff. The legal estate is unquestionably in the plaintiff, and he can therefore maintain trespass against the defendant, who is merely the lessee of the equitable interest in the plaintiff's wife: *Williams* v. *Waters*. (1) As against the legal owner, such a title cannot be relied on. But if the pleas

(1) 14 M. & W. 166.

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are good, the replication is a sufficient answer to them. Equity would not, under the circumstances disclosed on the pleadings, unconditionally restrain the action, but only upon terms. With regard to the last plea, a court of equity will not, except in very exceptional cases, restrain an action of assault.

Bosanquet, for the defendant. The substantial question is raised by the plea to the first count; the counts in trover and assault are merely ancillary, and as to the latter, there is no inflexible rule to prevent an injunction from issuing to restrain an action of assault. The defendant would be entitled to a perpetual injunction to protect him in the quiet possession of his land as against the husband of his lessor, who now seeks to disturb him. In equity the plaintiff is really in no better position than a mere stranger. His wife has absolute power over the property, and at any moment the plaintiff might be compelled by the defendant to confirm the wife's contract, and clothe him with the legal estate: *Taylor* v. *Meads* (1); *Appleton* v. *Rowley*. (2)

C. Hutton, in reply.

Cur. adv. vult.

April 28. MARTIN, B. We are of opinion that the defendant is entitled to judgment. The principle upon which courts of equity act with regard to property settled to the separate use of married women is stated in the case cited, *Taylor* v. *Meads* (1), viz., that she has the same right to protection in respect of her separate property against her husband as an unmarried woman has at law against a stranger, and her assignee or lessee has the same right. So far, therefore, as regards the first two counts of the declaration, the equitable pleas are good, and the facts stated in the replication are not an answer to them. We entertain no doubt that a court of equity would grant a perpetual injunction against the plaintiff's entering upon or continuing to occupy land, the separate property of his wife.

As regards the count for the assault, it was alleged that a court of equity does not interpose in actions for assault, and this, probably, is so as regards mere assaults; but the plea alleges that the assault here complained of was in consequence of the husband

(1) 34 L. J. (Ch.) 203. (2) Law Rep. 8 Eq. 139.

entering upon the lands of the lessee of his wife, settled to her separate use, and that the assault was the removal of him from the land. Now it seems to us that a court of equity would, for the protection of a wife's separate property, grant an injunction in such a case. If it did not do so it would fail to give a complete protection to the occupation of a wife's separate estate, a peculiar creation of its own, there being no defence at law to the action. It was argued that there was no room for a perpetual injunction in such a case as an assault, and that it had been repeatedly laid down that it was only in cases where a perpetual injunction would be granted, that an equitable defence could be sustained. It has certainly been frequently so said, and, generally speaking, it is a true test, but the statute (Common Law Procedure Act, 1854, s. 83) which gives the defence "upon equitable grounds," says nothing of perpetual injunction. The test given by it is that the court of equity would give relief against the judgment *on equitable grounds*. And it appears to us that if a husband obtained a judgment in an action for an assault, the assault being the removal of him from a house, the separate property of his wife, into which he had intruded himself against her will, a court of equity would interfere to prevent him from obtaining the fruits of the judgment. If they did not, we think they would fail effectually to protect a wife's separate property.

A court of equity would interfere in the case of an assault committed in the course of execution of its process, as for a contempt. This is not the present case, but it shows there is nothing in the circumstance of the action being for an assault that necessarily excludes the action of a court of equity.

CHANNELL and CLEASBY, BB., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorney for defendant: *H. Tyrrell.*

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April 29.

BROOMFIELD AND ANOTHER *v.* THE SOUTHERN INSURANCE COMPANY, LIMITED.

Shipping—Bottomry—Insurance on Bottomry Bond—Loss of Bottomry Bond.

The condition of a bottomry bond provided for its defeasance on payment of the amount of the bond, "or, in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed." The ship having become a constructive total loss, the bondholder, by a decree in the Admiralty Court (affirmed by the Privy Council) obtained payment to him of the proceeds of the ship, which had been paid into court, and which were insufficient; the Court holding that a bottomry bond was only discharged by payment or by an absolute total loss, and that the condition providing for defeasance on payment of such average as by custom should have become due, did not refer to the case of a constructive total loss.

In an action brought by the bondholder on a policy of insurance upon the bond:—

Held (following *Thomson* v. *Royal Exchange Assurance Corporation* (1 M. & S. 30),) that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry, and (following the decision of the Privy Council in *Stephens* v. *Broomfield* (Law Rep. 2 P. C. 516),) that the condition of defeasance did not apply to the case of a constructive total loss.

ACTION on a policy of insurance on a bottomry bond. The second count of the declaration set out the bond, which was made by W. Baillie, the master of the ship *Great Pacific*, in the penal sum of 14,000*l.*, the condition of defeasance of the bond being as follows:—

"If the above bounden William Baillie, his executors or administrators, or some or one of them, or the owners of the said ship or vessel, do and shall well and truly pay or cause to be paid unto the said John Broomfield and Reginald Whitaker or either of them, their or either of their executors, administrators, or assigns, or to their or either of their attorney or attorneys, agent or agents thereto lawfully constituted, the full and just sum of 7301*l.* 15*s.* 9*d.* of sterling British money, being the principal money secured by this bond, together with the interest or premium of 45*l.* per cent. for the voyage, before the expiration of twelve hours after the safe arrival of the said ship or vessel at the port of discharge in the United Kingdom, or, in case she shall proceed to Cork in Ireland, then before the expiration of twelve hours after the safe arrival of

the said ship or vessel at Cork aforesaid; *or, in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage;* or, if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed in consequence of fire, enemies, men of war, pirates, storms, or other unavoidable perils, damages, or casualties of the seas, rivers, and navigation to be sufficiently shewn and approved by the said William Baillie, his executors, or administrators, or some or one of them, or by the owners of the said ship or vessel, then this bond or obligation to be void and of no effect, or otherwise to remain in full force and virtue."

The count then set out a policy of insurance for 1000*l.* effected by the plaintiff with the defendants on the bottomry bond valued at 5037*l.* 12*s.* 5*d.*, the policy being in the common form of a marine policy. It then alleged that after the commencement of the risk insured against and during the continuance of the same, and whilst the policy was in full force, the ship was, by divers of the perils in the bottomry bond mentioned as well as by the policy insured against, and not by any of the perils, causes, matters, or things from which the subject-matter of the said insurance or the ship was warranted free, wholly lost on the insured voyage, and in consequence thereof the master of the ship during the insured voyage properly and necessarily sold the ship, and the proceeds of such sale amounted to a sum much less than the amount for which the bottomry bond had been given, and which was the subject of the bottomry bond as aforesaid, and by reason of the premises the defendants became and were liable under the policy to pay to the plaintiffs a certain sum in proportion to the sum of 1000*l.* so insured by them as aforesaid, to wit, a sum of 800*l.*, and all times, &c. Breach, that the defendants had not paid to the plaintiffs the said sum of 800*l.* Demurrer and joinder.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), in support of the demurrer. The argument which prevailed in the Privy Council in *Stephens* v. *Broomfield* (1), in favour of the plaintiffs, is

(1) Law Rep. 2 P. C. 516. This was a cause of bottomry in the Admiralty Court, promoted by the respondents as holders of the bottomry bond in question, against the proceeds of the *Great Pacific* in the hands of the

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conclusive against them here; for it is an established rule that in policies of insurance on bottomry bonds the word loss has the same meaning as in the bond itself: *Thomson* v. *Royal Exchange Assurance Society* (1); Parsons on Maritime Law, vol. i. pp. 208, 223; Abbott on Shipping, 11th ed. p. 126. By making good their claim to the proceeds of the ship, they established that the bond was not avoided; and, if not avoided, there was no loss within the meaning of the insurance.

Mellish, Q.C. (*Henry James, Q.C.*, and *Cohen*, with him), in support of the declaration. *Thomson* v. *Royal Exchange Assurance Society* (1) decides that where the obligor is not discharged from the bond, and a right to sue upon the bond exists, there is no remedy against the underwriters; and the authority of that case is not questioned. But the bond may be so worded, and it is reasonable that it should be, as to discharge the master in the event of a constructive total loss occurring, and the proceeds being paid to the bondholder; the bondholder then loses the difference between the amount he obtains as salvage and the amount of the bond, and is entitled to recover it over against the underwriters. The true construction of the present bond is to provide for this contingency; the defeasance is in three parts, and avoids the bond on either the three contingencies of, first, payment; third, total loss; and second, the intermediate state of things, when the vessel is constructively lost, provided the amount of the salvage is paid over to the bondholder. The form of the bond shews that this is the intention; any other construction would make the middle words unmeaning; and this becomes more clear when the form is compared with the form given in Park on Marine Insurance, 8th ed. p. 992, and Abbott on Shipping, 11th ed. App. p. cccxcv. (2),

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master, who, on the proceeds being brought into court, was dismissed from the suit. The claim was opposed by the appellant, a mortgagee of the ship intervening, who contended that the ship having become a constructive total loss, the bond was discharged. The Court held that the doctrine of constructive total loss did not apply to bottomry bonds, and that the middle condition of the clause of defeasance did not apply to a case where the ship remained in specie, and adjudged the whole proceeds (which were insufficient) to the bondholder.

(1) 1 M. & S. 30.

(2) The form of condition there given is as follows:—"Now the condition of this obligation is such that if the above-bound A. B., his executors,

where the second condition, providing for the case of a total loss, contemplates salvage. (1)

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or administrators, shall and do, well and truly pay, or cause to be paid, unto the said E. F., or his attorneys in London legally authorized to receive the same, their executors, administrators, or assigns, the full and just sum of 1000*l.* sterling, being the principal of this bond, together with the premium which shall become due thereupon, at or before the expiration of ninety days after the safe arrival of the said ship *Exeter* at her moorings in the river Thames; *or in case of the loss of the ship Exeter, such an average as by custom shall have become due on the salvage*, then this obligation to be void and of no effect, otherwise to remain in full force and virtue."

(1) This construction was also supported in the argument of *Stephens* v. *Broomfield*, in the Privy Council, by a reference to the form of bond given in Weskett's Digest of Insurance, where, after providing for the two contingencies of payment and total loss, the bond goes on to provide that in case of a loss where the guns, hull, and other stores are saved, the bondholders are to receive the amount of their bond out of what is saved, the shipowners taking the residue, "both parties remaining partakers and partners;" apparently indicating that in that event the bondholders and shipowners were at a common risk, the former only having a priority in the distribution of assets. The form is given at p. 58, and is described as the "form of a bottomry bond on a ship in use at Cadiz." After setting out the particulars of the sum advanced, &c., it proceeds: "And the said [sum of dollars] are to go and come this voyage at the risque and for the account of the creditor, with her approbation and consent, from the bay of this city to the port of New Vera Cruz, in the said kingdom of New Spain, and from thence back; on going in the said ship called *Queen of the Angels and St. Charles*, and upon her hull, keel, and earnings, which are of greater value than this debt, in the fitting only and equipping of which we declare to have converted the import of this writing, for which purpose the creditor lent it us; and on returning, she [the creditor] is to run the said risque in the aforementioned ship, and in the two that shall come as *Capitana* and *Almiranta* of this flota upon as many more dollars of plate, in double plate, which we oblige ourselves to embark in equal thirds, in the said three ships under register, with bills of lading in favour of the creditor. The which risques are, and so to be understood, of the sea, &c., provided the said ship *Our Lady of the Angels* going, or those upon which this risque shall be expressed to come in returning, shall be lost; in which case, the loss being total, we are to remain free from the payment of the sum of this debt, and this instrument null and void, as if it had not been made. But if, on going out, the said ship *Our Lady of the Angels and St. Charles*, shall run ashore or elsewhere be wrecked, and her voyage be overset, saving her guns, hull, or other stores of the ship; and if in the return those dollars shall be saved on which the risque is declared by her, or the said two ships, the *Capitana* and the *Almiranta*, the creditor is to receive from what is saved the sum of this obligation, and we the remaining value, both parties remaining partakers and partners; to the end that, deducting the costs and charges which its preservation shall have occasioned, the balance be divided and distributed as a

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KELLY, C.B. There has been no loss of this bond. Whatever construction you give to the middle clause, it is not a distinct condition contemplating a constructive total loss.

MARTIN, B. The question is, has the bond been lost by reason of the loss of the ship? Now it has been held that, in construing a bottomry bond, loss means a loss by going to the bottom of the sea; but what the second count alleges is only a constructive total loss. It is certainly difficult to find the meaning of the words used in the bond; but so much at least is plain from the form of bond found in Park on Marine Insurance, 8th ed. p. 992, that it does not apply to a case of this kind. The holder of the bond is to be entitled to the payment of the average due by custom on salvage, whatever that may be; but it would be an abuse of language to call the money recovered under the decree in the Privy Council average. The case of *Thomson* v. *Royal Exchange Assurance Society* (1) decided that the only event which will discharge a bottomry bond is an absolute total loss; and the second count, shewing only a constructive total loss of the ship, does not shew a loss of the bond.

PIGOTT, B. I am of the same opinion. I read the bond as containing two only, and not three conditions. The ambiguous line and a half, whatever it may mean, does not avoid the bond upon a constructive loss.

CLEASBY, B. I am of the same opinion. I will only add that the form seems in substance the same with that to be found in the most recent works on shipping; but it is nevertheless laid down without qualification in Arnould on Marine Insurance, vol. ii. p. 962, 3rd ed., that "the doctrine of constructive total loss is not applicable to contracts of bottomry, nor to policies effected on bottomry loans. If the ship exist in specie, though in a state which would warrant an assured on ship to abandon, as where the cost of repairs would greatly exceed the value when repaired, the

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partnership account, in order to which an attested account given by the person who shall have had the management of the affair shall be sufficient, without any other proof, although by law required, of which we release it," &c.

(1) 1 M. & S. 30.

assured on bottomry cannot recover, for the ship must be absolutely and totally destroyed in order to discharge the borrower." This is laid down with respect to the bottomry bonds now in use.

Judgment for the defendants.

Attorneys for plaintiffs: *Westall & Roberts.*
Attorneys for defendants: *Thomas & Hollams.*

BIRKS AND ANOTHER *v.* CLARKE.

May 11.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed—Assents—Security to be given for Composition—Unreasonable Delay.*

In pursuance of a resolution passed at a meeting of creditors, Messrs. C. & Co., on the 28th of May, 1869, issued a circular to the creditors containing a proposal by the debtor for a "composition of 6*s.* 8*d.* in the pound, payable in equal instalments at three, six, and nine months, the two last instalments to be secured." Assents were given to this proposal in the following form: "We, the undersigned, hereby agree to the composition proposed, and authorize you, or either of you, to sign such deed on our behalf, and undertake to execute the deed of release if tendered for that purpose." A deed was afterwards executed on the 7th of August, and registered on the 11th, under s. 192 of the Bankruptcy Act, 1861, by which the debtor covenanted to pay the composition by instalments of 2*s.* 3*d.*, 2*s.* 2*d.*, and 2*s.* 3*d.*, at three, six, and nine months from the date of registration, and to deliver promissory notes for the same within fourteen days of the registration, the notes for the two last instalments to be signed by the debtor and W. H.:—

Held, that the deed was not duly assented to,—first, because the assents did not state *how* the instalments were to be secured; secondly, because they did not state the point of time from which the periods of three, six, and nine months were to be reckoned; and thirdly, because they were not acted upon within a reasonable time.

ACTION on a guarantee. The defendant pleaded a deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by which the debtor (the defendant) covenanted to pay a composition of 6*s.* 8*d.* in the pound, by instalments of 2*s.* 3*d.*, 2*s.* 2*d.*, and 2*s.* 3*d.*, at three, six, and nine months from the date of the registration, and to deliver, within fourteen days after the same date, promissory notes for the instalments, the notes for the two last instalments to be signed by himself and William Hirst, who also by the deed covenanted separately with the creditors for the pay-

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ment of the two last instalments; and the creditors released the debtor from all debts and claims. Issue.

The cause was tried before Cleasby, B., at Nottingham, on the 8th of March, 1870, and objection was taken, amongst other things, to the assents to the deed, which were in the form of an answer to a proposal issued by Messrs. Crowther & Co., accountants, in pursuance of a resolution passed at a creditors' meeting, and addressed to the respective creditors. The proposal and assent were as follows:—

"(Proposal)—Re Adam Alfred Clarke offers a composition of 6*s.* 8*d.* in the pound, payable in equal instalments at three, six, and nine months, the two last instalments to be secured.

"(Assent)—We, the undersigned, hereby agree to the composition proposed, and authorize you, or either of you, to sign such deed on our behalf, and undertake to execute the deed of release, if tendered for that purpose. The amount of debt is, &c.

(Signed) &c."

The deed pleaded was afterwards prepared, and was executed on the 7th of August, and registered on the 11th.

The plaintiffs were dissenting creditors.

The learned judge was of opinion that the assents were not sufficient, on the ground that they did not state *how* the instalments were to be secured, and directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter a verdict for him. A rule having been obtained,

Overend, Q.C., and *Wills*, shewed cause, and contended that although it had been decided in *Rutty* v. *Benthall* (1) and *Waddington* v. *Roberts* (2) that an assent might be given to a deed under the Act before its execution, or even its preparation, yet it must be a full assent to all its terms, and that an assent to a payment "to be secured," without saying *how*, was too vague; they also contended that, even supposing the assent to be in form sufficient, it had not been followed, for that the periods of payment must be reckoned from the date of the assent, or of the deed.

[MARTIN, B. Or of the proposal?]

At any rate, not from the registration; and, lastly, that the

(1) Law Rep. 2 C. P. 488. (2) Law Rep. 3 Q. B. 579.

assent was not acted upon within a reasonable time, and therefore lost its force.

Field, Q.C., and *Cave*, supported the rule, and contended that the assent was sufficiently definite for practical purposes, and was within the cases cited; that it had not been shewn that the security of Hirst was illusory or inadequate; and that the date of registration, as the period from which the deed took its full operation, must be the period referred to in the assent.

KELLY, C.B. This rule must be discharged, on the ground that the assents in question are insufficient. What the Act requires is an assent to the *deed;* and, primâ facie, one would suppose that the party assenting must have actually seen the deed and made himself acquainted with its contents. It has been held, however, that assent may be given to a deed before, as well as after, its execution or preparation; but the assent must, nevertheless, be an assent to the deed, that is, to the contents of the deed which is afterwards in fact prepared and executed. The question then is, do the documents in question amount to such an assent? The first objection is that they assent only to a deed which shall provide for a composition payable by instalments, the payment of the instalments *to be secured.* But, how secured? The deed may provide a security of a wholly different kind from that which one or more, or perhaps all, of those who assented contemplated. How can we say whether any one of the creditors would have been satisfied with the personal security of Hirst? To make an assent in such a case good it must specify a mode in which the instalments are to be secured, and the deed must contain provisions securing the instalments in the mode assented to.

But there is a second and more substantial objection. The very essence of the transaction, and the consideration on which the creditors agree to give up their debts, is the payment of the instalments at the *times* stipulated for. Therefore an assent to be valid and binding must specify the point of time from which the period or periods are to be computed, at the expiration of which the payments are to fall due. It is otherwise left in uncertainty whether the starting point is the proposal, the assent, the execution of the deed, or its registration. We are not called upon to decide what

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point of time the deed ought to have fixed, supposing the assent to have been good; it is sufficient to say that it is impossible an assent, so uncertain that it might apply to any of the times I have mentioned, can be a good assent to a deed which dates the instalments from the day of registration. If it were necessary to decide the point, I should myself say that that time was not the time contemplated by the assents. If I promise that I will secure by a deed certain payments to be made at periods of three, six, and nine months, a deed containing a covenant for such payments at three, six, and nine months simpliciter, that is from the date of the covenant, would be a compliance with the promise.

But there is a third objection, which is, perhaps, the most substantial of all three. It must be an implied condition to such an assent that the deed shall be executed within a reasonable time after the assent is given. If the acting upon the assent is delayed in the manner it has been here, the effect is to convert the stipulated periods of three, six, and nine months into periods of six, nine, and twelve months. It is impossible to say that, under these circumstances, the terms of the assent have been complied with.

MARTIN, B., concurred.

CLEASBY, B. I am of the same opinion. Put it how you will, the assent must be an assent to all the matters in the deed, whether already executed or prepared or not; what is assented to must be equivalent to what is in the deed. Now, to say that payment is to be secured is to say nothing definite; it is wholly unspecific, and applies equally to any of the numerous modes in which a security may be given. On that ground, to which I confine myself, I think these assents are insufficient.

Rule discharged.

Attorneys for plaintiffs: *Pattison, Wigg, & Co., for Broomhead & Wightman, Sheffield.*

Attorneys for defendant: *Swan & Co.*

VINES AND WIFE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.
FROST *v.* THE SAME.

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May 11.

Costs on Trial of Writ of Inquiry—Two Counsel—Good Jury.

On taxation of the plaintiffs' costs at the trial of a writ of inquiry to assess damages, in an action of negligence arising out of a railway accident, the master allowed costs for two counsel.

On a rule to review the taxation, the Court declined to interfere with the master's discretion.

The master also allowed the payment of special jury fees to a good jury:—

Held (following the case of *Vickery* v. *London, Brighton, and South Coast Ry. Co.* (Law Rep. 5 C. P. 165), (Martin, B., doubting),) that the allowance was right.

AN action having been brought by the plaintiffs, Vines and wife, to recover damages for injuries sustained by the wife in a railway accident, through the negligence of the defendants' servants, the defendants suffered judgment to go by default, and a writ of inquiry was issued, on the trial of which, before the Secondary of London, the plaintiffs recovered a verdict for 250*l.*

Two counsel were employed on each side, and a "good jury" was summoned; and on taxation of the plaintiffs' costs the master allowed the costs of two counsel, and also special jury fees paid to the good jury. A rule having been obtained to review the master's taxation (1),

Channell shewed cause, and cited with respect to the costs of the two counsel, *Hawkins* v. *Rigby* (2), and *Price* v. *Williams* (3); and, with respect to the jury fees, *Wilkinson* v. *Malin* (4), Lush's Pract. vol. ii. 3rd ed. p. 798, 6 Geo. 4, c. 50, ss. 35, 50, and 52; and the general rules of 2 Wm. 4, r. 106; 7 Wm. 4 & 1 Vict. c. 55, s. 2.

Lopes, Q.C., and *Joyce*, in support of the rule, cited on the first point, Dax on Costs, p. 160 (n.); and on the second point, Tidd's

(1) The same point with respect to the allowance of two counsel under similar circumstances arose in the case of *Frost* v. *London, Brighton, & South Coast Ry. Co.*, the rule in which was argued with the principal case by *C. Russell*, for the plaintiff, and by *Lopes, Q.C.*, and *Joyce*, for the defendants. The plaintiff in that case obtained a verdict for 170*l.*

(2) 8 C. B. (N. S.) 271; 29 L. J. (C.P.) 228: see also *Sinclair* v. *Great Eastern Ry. Co.*, Law Rep. 5 C. P. 135.

(3) 5 Dowl. 160.

(4) 1 C. & M. 237.

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VINES v. BRIGHTON RAILWAY CO.

Practice, vol. ii. 9th ed. p. 787; Watson on the Office of Sheriff, p. 389; *Calvert* v. *Gordon* (1), *Reg.* v. *Perry* (2), and 24 Geo. 2, c. 18, s. 2.

KELLY, C.B. Upon one point, which is indeed the only point in the rule in *Frost's Case* (3), we are all agreed. It was at first contended for as an absolute rule, that on the trial of writs of inquiry two counsel were not to be allowed. But, on looking into the matter, it appears that the supposed rule rests on a note in Dax on Costs, at p. 160, in support of which no authority is cited. It is impossible to hold that in no case would two counsel be allowed upon such a trial, whatever the importance of the issue; and, in fact, that construction has been abandoned by the counsel for the defendants.

Upon the other hand it is urged that there is an absolute discretion vested in the master as to the amount of costs, and that we cannot with propriety enter into the question of whether that discretion has been properly exercised. We certainly ought not to do so, unless we are perfectly satisfied that he has fallen into a substantial error; but upon this, as upon every point, it is open to the Court to review what has been done by its officers, although it ought to exercise its power of overruling their discretion only in extraordinary cases.

We must, therefore, examine the nature of these cases. They arise out of the same circumstances, they are of the same nature and description, and in each one serious injury has been sustained, and a substantial verdict was returned. The plaintiffs were not, indeed, called upon to prove that the injury arose out of the negligence of the defendants, that being already admitted, but in each case a bonâ fide claim of damages was submitted to the jury, which the jury affirmed by their verdict. In such cases a question often arises, whether the nature and the extent of the injury which the plaintiff alleges he has suffered is, or is not, wholly, or in great part, fictitious, and such an issue involves serious questions of character. But, moreover, in all these cases it is necessary to call medical evidence; the counsel engaged must enter upon a cross-examination

(1) 3 Man. & Ry. 124. (2) 5 T. R. 453.
(3) See ante p. 201, note (1).

requiring skill, knowledge, and care; in the course of such an examination it is often essential to have the answers taken down verbatim; and, during the progress of the examination in chief of the witnesses upon the other side, it may become requisite to consult with a medical witness with reference to the evidence then being given. In some cases, no doubt, one counsel would be sufficient, but in others, and especially where questions of character arise, it cannot be said that two are too many.

On these grounds, if the case rested there, I should hold that the master, who has no doubt considered all the particular circumstances of the case before him, was justified in allowing the costs of two counsel. But the case does not rest there; for we are bound to observe that the defendants themselves, following their invariable practice, have also retained two counsel. It hardly lies in the mouth of those who, perhaps, may call no witnesses at all, to say that it is unreasonable in the plaintiffs to provide themselves with the like number, or to retain the services of an eminent and experienced leader. Upon the other point we will take time to consider.

MARTIN and PIGOTT, BB., concurred.

Cur. adv. vult.

May 11. The judgment of the Court (Kelly, C.B., Martin and Pigott, BB.) was delivered by

KELLY, C.B. In this case a rule has been obtained to review the taxation of costs, on the ground that the master has allowed fees to two counsel, and also the payment of twelve guineas for a good jury, upon the trial of an action against the defendants upon a writ of inquiry after judgment by default. The objection to the costs of two counsel was disposed of upon the argument, and we are of opinion that the rule must be discharged, and the taxation of costs by the master sustained with respect to the twelve guineas allowed for a good jury. We find that for forty-five years past it has been the practice to allow the payment in question, wherever a good jury has been summoned under a judge's order before the Secondary in the city of London. The practice has been somewhat different in Middlesex, where half a guinea only has been paid when the jurymen constituting the good jury were selected only from the better classes of tradesmen, but a guinea has been

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paid when the jurymen were chosen from the lists of special jurors. Looking to the reasonableness as well as the antiquity of the former practice, and thinking it not inconsistent in principle with that which has prevailed in Middlesex, we think it ought to be followed and upheld as well in Middlesex as in London. My Brother Martin, indeed, is disposed to doubt whether we have any power to sanction or to allow this payment—which he thinks is in effect to levy a tax upon a class of the people—except under the authority of parliament, or by virtue of immemorial usage; but after fully considering the cases which have been decided upon this subject, and the elaborate and unanimous judgment of the Court of Common Pleas in the case of *Vickery* v. *London, Brighton, and South Coast Ry. Co.* (1), we feel bound to adopt and to follow that decision, and to hold that the taxation of costs by the master was correct. We are, therefore, of opinion that the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs Vines and wife: *Houghton & Wragg.*
Attorneys for plaintiff Frost: *Mackeson & Goldring.*
Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

May 11.

THE LORDS BAILIFF-JURATS OF ROMNEY MARSH *v.* THE CORPORATION OF THE TRINITY HOUSE.

Negligence—Proximate Cause—Natural Forces—Duty of Owner in Possession of Wrecked Vessel.

The defendants' vessel being driven upon a sea wall became a wreck, and could not be removed otherwise than by breaking her up. Valuable property was on board, which would have been lost if she had been immediately broken up. The defendants removed the property with reasonable speed, and then broke up the vessel. During the period which elapsed between the time when she could have been first broken up and the time when she was broken up in fact, damage was done by the vessel to the sea wall on which she lay:—

Held that the defendants (assuming them not to have been guilty of any negligence), although remaining in possession, were only bound to use reasonable care and diligence in preventing the ship from damaging the sea wall, and were entitled to remove the property on board before breaking her up, and that having done so with reasonable speed they were not liable.

(1) Law Rep. 5 C. P. 165; decided since the argument of this case.

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The defendants' vessel, owing to the negligence of their servants, struck on a sandbank, and becoming from that cause unmanageable, was driven by the wind and tide upon a sea wall of the plaintiffs', which it damaged :—

Held, that the defendants were liable for the damage so caused.

SPECIAL CASE stated in an action for negligence tried before Cockburn, C.J., at Maidstone, on the 10th of March, 1869, in which a verdict was found for the plaintiffs for 93*l*., subject to the opinion of the Court on a special case.

The first count of the declaration charged the defendants with unskilful and negligent navigation of their ship by their servants, whereby the same was wrecked, and ran foul of and injured a sea wall of the plaintiffs'; the second count charged that the defendants were possessed and had the control and management of a ship which, while in their possession, control, and management, had been wrecked and driven against a sea wall of the plaintiffs', and did, and was continuing and likely to continue to do injury to the wall by being bumped against it; that by reasonable care and diligence the defendants might have prevented the vessel from doing and continuing to do the said further injury; but that the defendants did not use such care and diligence, by reason whereof the vessel did further injury to the wall by being bumped against it.

By their pleas the defendants traversed all the averments in the declaration.

The facts stated in the case were as follows. On the 30th of November, 1867, the defendants' pilot cutter *Queen*, through the negligence of her captain and crew, struck upon a shoal about three quarters of a mile out from the Dymchurch wall, a sea wall owned and repaired by the plaintiffs. It was then blowing hard, and there was a flood tide; and in consequence, after the vessel struck, the captain and crew lost all control over her, and she gradually drifted towards the shore, and was at last driven against the wall. If the weather had been moderate and the state of the tide different, this might have been prevented, but in the then state of the weather and tide it was impossible to prevent it. After the ship struck the ground, some of the crew escaped in a boat, and the captain and the rest of the crew were rescued from the cutter just before she struck the wall.

During the following night the cutter remained on the wall a

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wreck, and with no one in possession of her; but on the next day the defendants' servants resumed possession, saved some portion of her sails, stores, &c., and secured the cutter by anchors to the wall so as to prevent her from doing more damage than was inevitable as long as she remained on the wall.

On the 4th of December the cutter was surveyed by the defendants, and, being found past repair, she was, on the 9th, sold by auction, and on the 13th broken up.

After the cutter was driven on the wall, it was impossible to get her off, or to prevent further damage being done every tide, except by breaking her up. This might have been accomplished by defendants' servants by the 5th of December; but in that event a considerable amount of property would have been lost, which was in fact saved, and the defendants' servants acted prudently in defendants' interest in the steps they took; the interval between the 30th of November and the 9th of December not being longer than was reasonably necessary for the removal of the property saved. The amount of damage done to the wall between the 5th and the 9th was slight, but appreciable; for damage done after the 9th, the plaintiffs did not claim.

The question for the opinion of the Court was, whether the defendants were liable in this action for all or any part of the damage done to the wall. If the Court should be of opinion in the affirmative, the verdict was to be entered for the plaintiffs for the sum of 93*l.*

Jan 19. *Sir G. Honyman, Q.C.* (*Biron* with him), for the plaintiffs. Upon the first count the defendants are clearly liable. The vessel took the ground through negligence, and all that followed, though then inevitable, was as much the consequence of negligence as the injury done by a runaway horse would be if it was owing to the carelessness of his driver that he was allowed to get beyond control in the first instance: *Tarner* v. *Walker* (1); *Matthews* v. *Discount Corporation.* (2) Upon the second count the plaintiffs are also entitled to recover. The plaintiffs were still in possession of the ship, as is shewn by their subsequent dealing with it; they are therefore liable for the injury which was done by neglecting to

(1) Law Rep. 2 Q. B. 301. (2) Law Rep. 4 C. P. 228.

remove it from the wall: *White* v. *Crisp* (1); *Vivian* v. *Mersey Docks and Harbour Board.* (2)

Pollock, Q.C. (*Dixon* with him), for the defendants. As to the second point, the facts found by the case are a conclusive answer, both upon the authorities and with reference to the terms of the declaration, which alleges that they might, by reasonable care, have prevented the vessel from doing further injury. It was only the duty of the defendants to use reasonable care, and it would not have been reasonable to break up the ship, containing valuable property; but that, the case finds, was the only possible mode of preventing damage to the wall: *King* v. *Watts* (3); *Brown* v. *Mallett.* (4) Puffendorf De Jure, N. & G., book 2, c. 6, s. 8. As to the first point, it cannot be properly said that the defendants' negligence was the proximate cause of the injury. There intervened between their act of negligence and the alleged consequence a series of natural causes over which they had no control, and which could not be calculated on, such as the shifting of the wind, its violence, and the force of the tide as dependent upon it: *Scott* v. *Shepherd* (5); *Livie* v. *Janson* (6); *Ionides* v. *Universal Marine Insurance Co.* (7)

Sir G. Honyman, Q.C., in reply. In *King* v. *Watts* (3) and *Brown* v. *Mallett* (4) the ship was abandoned; but the defendants had no right to retain possession of their property and save it at the expense of the plaintiffs: *Philpott* v. *Swann.* (8) As to the negligence, the whole was one continuous train of causation: *Dent* v. *Smith* (9); *Lee* v. *Riley* (10); *Vandenburgh* v. *Truax* (4 Denio R. 464) cited in Smith's Leading Cases, vol. ii. 6th ed. p. 499, in the note to *Vicars* v. *Wilcocks.*

KELLY, C.B. As to the second count, we are all clearly of opinion that the defendants are entitled to our judgment. It is impossible to contend that there was any negligence on the part

(1) 10 Ex. 312; 23 L. J. (Ex.) 317.
(2) Law Rep. 5 C. P. 19.
(3) 2 Esp. 675.
(4) 5 C. B. 599.
(5) 2 W. Bl. 892.
(6) 12 East, 648.
(7) 14 C. B. (N. S.) 259; 32 L. J. (C.P.) 170.
(8) 11 C. B. (N. S.) 270, at p. 281; 30 L. J. (C.P.) 358.
(9) Law Rep. 4 Q. B. 414.
(10) 18 C. B. (N. S.) 722; 34 L. J. (C.P.) 212.

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of the defendants in not breaking up the ship under the circumstances of the case. It appears that there was valuable property on board which they could not save otherwise than by taking it out before the ship was broken up. The matter therefore resolves itself into the question, whether there is any duty to break up and sacrifice valuable property for the purpose of preventing it from doing damage where it lies. It must be assumed, for the present purpose, that the ship was, without negligence, thrown into a position where it injured the plaintiffs' wall. Under these circumstances, there was no duty to do more than use reasonable care and skill in removing it. There was no duty to sacrifice the vessel in the plaintiffs' interests. As to the other point, we will consider our judgment.

MARTIN and PIGOTT, BB., concurred.

Cur. adv. vult.

May 11. The judgment of the Court (Kelly, C.B., Martin and Pigott, BB.) was delivered by

KELLY, C.B. The question in this case is, whether the injury to the plaintiffs' wall was so caused by the negligence of the defendants as to make the defendants liable within the rule of law applicable to such cases.

The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sand-bank within three quarters of a mile of the wall of the plaintiffs', the immediate effect of which was that the vessel became unmanageable and beyond the control of the crew; and as at the time a high wind was blowing and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question.

The rule of law is, that negligence to render the defendants liable must be the causa causans, or the proximate cause of the injury, and not merely a causa sine quâ non.

I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at the moment to the sea, and this

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was directly upon and towards the plaintiffs' wall. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had, by some negligence, broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think that it would, and that such a case and the case before the Court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of the ship being driven against the wall of the plaintiffs, and that the plaintiffs are therefore entitled to recover. My Brother Pigott concurs in this judgment, and my Brother Martin, though entertaining some doubt upon the case, does not dissent.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Austen, De Gex, & Harding.*
Attorneys for defendants: *Symes, Sandilands, & Co.*

PEIRCE *v.* JERSEY WATERWORKS COMPANY, LIMITED.

May 10

Company—Power to commence Business—Whole Capital to be subscribed for.

A clause in the articles of association of a company registered under the Companies Act, 1862, provided that, when and so soon as 3000 shares in the company should have been subscribed for and allotted, the members of the company for the time being should be and continue associated for the objects of the company, and the regulations for the management thereof should be in force and binding on such members in like manner as if the whole of the shares into which the nominal capital was divided had been subscribed for and allotted. Before 3000 shares were subscribed for, the directors appointed the plaintiff engineer to the company. In an action against the company for the plaintiff's salary:—

Held, that the clause was valid and effectual; that until 3000 shares were subscribed for, the directors had no power to make any contract for carrying on the business of the company; and that, therefore, the plaintiff could not maintain the action.

DECLARATION for work done, journeys performed, attendances bestowed, and materials provided, by the plaintiff as an engineer and otherwise, for the defendants, at their request.

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Pleas: 1. Never indebted. 2. A plea setting out the 2nd clause of the defendants' articles of association (set out below, p. 212), and alleging that 3000 shares had not been subscribed for and allotted; that the claim was in respect of other matters than those which the defendants were then, by reason of the premises, empowered to transact, and of business which the company and the directors were not, by reason of the premises, then empowered to carry on, of which the plaintiff had notice, and was a claim which the company could not, by reason of the premises, contract to be liable for.

Replication: 1. To the first plea, Issue. 2. To the second plea, setting out certain clauses of the articles relating to the powers of directors (set out below, p. 213), alleging that the plaintiff's claim was in respect of matters and business which he was hired, appointed, and employed by the directors by resolution to transact and perform in this country and in Jersey, to assist in carrying out the purposes of their undertaking, and which matters and business were preliminary and necessary to enable the defendants to commence and carry on the general business of the company, and for moneys paid and liabilities incurred by him on behalf of the defendants for a like purpose in the performance of his duties, and in carrying into effect the orders of the directors; and that the said matters and business were transacted and performed, and the said moneys were paid and liabilities incurred, by the plaintiff as aforesaid for the purposes aforesaid, and for the sole use and benefit of the defendants; and that the defendants had had and enjoyed the sole use and benefit accruing from the same. 3. Repeating the allegations of the 2nd plea, and denying notice that 3000 shares had not been subscribed for.

Issue on and demurrer to the 2nd and 3rd replications, and joinder in demurrer.

The cause was tried before Bramwell, B., at the Guildhall sittings after Hilary Term, 1870. The evidence for the plaintiff was, that he was appointed engineer to the company, at a salary of 1000*l.* a year, by a resolution of directors passed at a board meeting; that he went to Jersey to examine the district, and to obtain support for the company; that he made plans, and drew out specifications, and made a report to the directors. It also appeared

that he had no actual notice that 3000 shares had not been subscribed for. His claim was for half a year's salary.

The evidence for the defendants was, that the plaintiff accepted his appointment on the understanding that Taylor, the contractor, was to pay all expenses, and that they had received no benefit from plaintiff's work and labour. They also proved that 3000 shares had not been subscribed for.

The learned judge ruled that the expenses were not preliminary, and left to the jury the questions, whether the plaintiff was employed by the defendants on the terms that he should be paid by them, and whether he had notice that 3000 shares were not subscribed for. The jury answered both questions in favour of the plaintiff. The verdict was entered for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him for 500*l*. A rule was obtained accordingly, and for a new trial, on the ground of misdirection by the learned judge in not leaving to the jury the question of whether the expenses were preliminary; and a cross rule was obtained by the defendants for a new trial on the ground that the verdict was against evidence.

In the memorandum of association the objects for which the company was established were stated to be—

"1. The procuring in the island of Jersey of a supply of water for the use of St. Heliers, and any other towns or places in such island, and for that purpose the doing of *all such acts as the directors are authorized to do by the accompanying articles of the association of the company.*

"2. The supply of such water to all or any one or more of the places before mentioned, and the acquisition of all necessary lands or rights, and the erection of all necessary or proper buildings, erections, and works, and, generally, the doing of all such other acts and things as are incidental or conducive to the attainment of the above objects, or either of them."

The preamble to the articles was as follows:—"Whereas it has been in contemplation to form a company with the objects stated in the memorandum of association hereunto annexed, and, for the purpose of carrying such contemplation (sic.) into effect, certain persons who have interested themselves in the promotion and formation of the said company have expended moneys, incurred liabilities to

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various persons, and devoted the time of themselves and servants for collecting and obtaining the information and assistance necessary for such purpose; and whereas it will become necessary before the said company is fully carried out, that further moneys should be expended, liabilities incurred, and labour employed for the purpose of procuring from the legislature of Jersey, or other competent authority, an Act of State, or other full and sufficient power to enable the company to carry out the objects of their undertaking; and it is deemed reasonable, proper, and just, by those who have agreed to join in the formation of the present company, that the sum of 2000*l.* should be paid to Messrs. Easton, Amos, & Sons, who have undertaken to receive the same on behalf of the aforesaid promoters, as the full and unqualified remuneration for the moneys which have been or will be expended, the liabilities which have been or will be incurred, and the time and labour which have been or will be employed by or on behalf of the said promoters as before mentioned, in full discharge for their said claim, down to and including the expenses of the registration and incorporation of the company, and of obtaining the said Act of State or other powers as aforesaid, *and the procuring to be subscribed an amount of capital in the said company to the extent of* 3000 *shares therein at the least*, and also the remuneration of the directors of the company until such time as there shall be a profit arising from the undertaking, which remuneration has been determined at the sum of 700*l.* (part of the said sum of 2000*l.*), to be divided upon the same principle as is hereinafter directed by clause 59, with respect to the remuneration of directors."

The 1st clause of the articles excluded Table A. The 2nd clause provided that "*when and so soon as* 3000 *shares in the company shall have been subscribed for and allotted, the members of the company for the time being shall be and continue associated for the objects of the company, and the regulations for the management thereof shall be in force and binding on such members*, in like manner as if the whole of the shares into which the nominal capital is divided had been subscribed for and allotted. And after the directors shall have allotted any number less than the whole of the shares, they shall have power to allow the remainder thereof, or any part of the same, from time to time as they shall deem fit,

and on such terms and conditions as the members shall by a resolution passed at a general meeting, either ordinary or extraordinary, direct; and if no such direction shall be in existence, then upon such terms and conditions as the directors shall determine. All premiums which may be realized on the issuing of such shares, shall be the property of the company."

With respect to the powers of directors, clause 60 empowered the directors to employ officers and servants of the company to assist in carrying out the purposes of their undertaking or any of them; and to delegate to any officer of the company the power to enter into all contracts in Jersey, which the directors should deem necessary or convenient for the purposes of the company; and to pay over to any officer or servant of the company sums for wages or other small outgoings; and clause 61 empowered them to apply to the legislature, or to any other authority or authorities in the island of Jersey competent to grant the same, for all and every or any such Act or Acts of the State, licence or licences, powers or authorities, as the directors should, at any time or times, or from time to time, think necessary or proper or convenient for the purposes of the company; and also to pledge the company to the performance of all such acts, matters, or things, as should be prescribed as conditional on the grant of such Act, &c., and to indemnify out of the funds of the company any director or other officer, against all losses or liabilities they might incur in the performance of their duties, or in carrying into effect the order of the directors or of any general meeting.

By clause 62, "in all other respects the business of the company shall be managed by the directors, who shall *when and so soon as* 3000 of the shares shall have been subscribed for, pay to the said Messrs. Easton, Amos, & Sons, the sum of 2000*l.* before-mentioned; and the directors may also exercise all such powers of the company as are not by the Companies Act, 1862, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

Clauses 63 and 64 gave power to the directors to do acts and

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make contracts, and to borrow money for *carrying on the business* of the company.

Powell, Q.C., and *Shaw*, shewed cause against the plaintiff's rule. The directors had no power to make the contract sued upon, and the defendants are not therefore bound by their act. Nothing can be clearer or more express than the documents which regulate the proceedings of the company. In stating the objects of the company, the memorandum of association directly refers to the articles describing the objects as being the procuring a supply of water, "and for that purpose the doing of all such acts as the directors are authorized to do by the accompanying articles of association." The memorandum, therefore, limits the objects of the company to those acts which the articles empower the directors to do, and puts any other beyond the scope of the company's incorporation. But the memorandum forms the very basis of the incorporation; and, therefore, assuming the articles to limit the acts of the company and the powers of the directors in the manner contended for, the defendants' case would be established, even without recourse to the doctrine that directors are only special agents of the company, and cannot make them liable beyond the scope of their authority. But that doctrine is also clearly recognized as established in equity: *Ernest* v. *Nicholls*. (1) The deed is in truth incorporated into the act, per Wood, V.-C., *Fountaine* v. *Carmarthen Ry. Co.* (2); see also Lindley on Partnership, 2nd ed. vol. i. p. 256. It is also established at common law: *Taylor* v. *Chichester and Midhurst Ry. Co.* (3); and the cases there cited; indeed, this is a matter in which nothing turns upon the distinctive doctrines of law and equity, and what is true in the one system must be true also in the other. The question of what is the nature and extent of agency or authority, like the question of what is a contract, is the same for both. The case of *Royal British Bank* v. *Turquand* (4), is no authority against the defendants; for, in the first place, the Court of Exchequer Chamber affirmed the judgment of the Queen's Bench, merely on the ground that the borrowing was sufficiently authorized within the terms of the articles;

(1) 6 H. L. C. 401, 418. 3 Jur. N.S. 919
(2) Law Rep. 5 Eq. 316, at pp. 321, 322.
(3) Law Rep. 2 Ex. 356.
(4) 6 E. & B. 327; 25 L. J. (Q.B.) 317. 2 Jur. N.S. 663.

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and, in the second place, it was assumed in the Court below, that the money which had been advanced and which was sought to be recovered in the action, had been applied in the business of the company and for the benefit of the shareholders (per Lord Campbell, C.J.) (1), in which case even money raised by illegal instruments may be followed into the hands of the company and made a charge upon the assets: *Re Cork and Youghal Ry. Co.* (2) It is clear, therefore, that the plaintiff was bound by the articles, or rather that he cannot take advantage as against the company of any act which the directors have assumed to do, but for which they had, in fact, no power. Now the second clause of the articles is express, that the members shall only be associated for the objects of the company when 3000 shares have been subscribed; until, therefore, that condition is complied with, there is no association for those objects and no power in the directors except to allot the shares which are subscribed for. The same thing is expressed in the preamble, which recites that a sum of 2000*l.* is to be paid for preliminary expenses, including the procuring of a subscription for 3000 shares; and this intention is carried out in the 62nd clause, by which the directors are to pay the 2000*l.* only when 3000 shares have been subscribed for. These affirmative words are sufficient without negative words; as is shewn by *North Staffordshire Steel and Iron Co.* v. *Ward* (3), where a similar provision, couched in affirmative terms only, was held sufficient to support the negative averments made in the plea. That case, and the cases there cited, especially that of *Fox* v. *Clifton* (4), govern the present case. The suggestion thrown out in *Ex parte Ward* (5), that the company might be liable for preliminary expenses, has no application here; for, in the first place, the preliminary expenses are already provided for by the articles; nothing is to be at the risk of the company, but everything at the risk of the promoters, until 3000 shares are subscribed for, and then 2000*l.* is to be paid over to specified persons in full satisfaction of all the expenses they have incurred; in the second place, preliminary expenses are expenses preliminary to carrying on business; but the plaintiff's

(1) 5 E. & B. at p. 262; 24 L. J. (Q.B.) at p. 331.
(2) Law Rep. 4 Ch. 748.
(3) Law Rep. 3 Ex. 172.
(4) 6 Bing. 776.
(5) Law Rep. 3 Ex. 180.

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claim is clearly in respect of matters which form part of the business itself.

Clarke, Q.C., and *J. Edward Wilkins*, in support of the plaintiff's rule. The case of *North Staffordshire Steel and Iron Co.* v. *Ward* (1) only involved the relation between the company and its shareholders, not between the company and third persons; and the cases are distinct. A company might well have property out of which to answer its liabilities, although it could not enforce the payment of calls from its shareholders. Moreover, the case of *Ex parte Ward* (2) indicates that there may be expenses to which a shareholder may be liable, notwithstanding such a provision as the present one. It is not necessary here to go so far as the dissenting judges (Willes and Blackburn, JJ.), in *Taylor* v. *Chichester and Midhurst Ry. Co.* (3) now in the House of Lords on appeal, but their observations are strongly in favour of the plaintiff. So also are the remarks of Jervis, C.J., in delivering judgment in the Exchequer Chamber in *Royal British Bank* v. *Turquand* (4): "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." So here, it may be assumed the plaintiff would have seen by the articles that 3000 shares were to be subscribed for and allotted before anything else was done; but when he found the directors affecting to deal on behalf of the company, he was entitled to assume that the 3000 shares had been subscribed for. In fact, this was not a matter within his own knowledge, or one which he had any means of discovering; but it was within the knowledge of the directors whom the company had entrusted as their agents. The company cannot deny that they are an incorporated company, for they are so by the positive words of the Act, 25 & 26 Vict.

(1) Law Rep. 3 Ex. 172. (2) Law Rep. 3 Ex. 180.
(3) Law Rep. 2 Ex. 356. (4) 6 E. & B. at p. 332; 25 L. J. (Q.B.) at p. 318.

See 2 Jur N S 664

c. 89, s. 6; and they cannot deny that the directors are their directors, for they are the directors named in the articles; the company are, therefore, bound by their acts, being acts within the general scope of the objects of the company: *Orr* v. *Glasgow, Airdrie, and Monklands Junction Ry. Co.* (1); *Agar* v. *Athenæum Life Assurance Society* (2); *Ornamental Pyrographic Woodwork Co.* v. *Brown.* (3) It has been assumed that the articles really contain some provisions by virtue of which the powers of the directors only arise on the allotment of 3000 shares being completed; but they do not bear that construction. The 60th and 61st clauses evidently contemplate some acts as to be done on behalf of the company before the full subscription and allotment; and this is made the more clear from the manner in which the 62nd clause is framed, which says formally, that the business of the company shall be managed by the directors, and then adds, "who shall, when and so soon as 3000 of the shares shall have been subscribed for," pay over the 2000*l.*; and afterwards goes on, "and the directors may also exercise all such powers of the company" as are not reserved for the company in general meeting. This draws no distinction between the exercise of their powers before and after the subscription for 3000 shares; but, on the contrary, carefully avoids making the existence or the exercise of those powers dependent on that event, and only (in conformity with the preamble) defers till then the payment of the 2000*l.* Moreover, these were preliminary expenses within the meaning of the language used in *Ex parte Ward.* (4)

MARTIN, B. In my judgment this rule should be discharged, on the ground that, looking at the terms of the articles of association, until 3000 shares were subscribed for there existed no such incorporated company as the plaintiff could contract with. That is, I think, the true construction of the second clause; until the happening of that event, although the directors might contract in their own names, they could not contract as directors of the company, and so as to bind them. If there be anything in the Act of

(1) 3 Macq. 799.
(2) 3 C. B. (N.S.) 725; 27 L. J. (C.P.) 95.
(3) 2 H. & C. 63; 32 L. J. (Ex.) 190.
(4) Law Rep. 3 Ex. 180.

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25 & 26 Vict. c. 89, contrary to such a provision, no doubt that must control it. But the Act itself, by s. 14, provides for the registration of articles of association, which are to form the constitution of the company; and it appears to me that if the subscribers state in their articles of association, as they do here, that they shall not be associated for the purposes of the company till a particular event happens, that event is a condition precedent to the effectual existence of the company at all as an active living company. Until that event there is no company capable of contracting.

With respect to *Ex parte Ward* (1), I will only say that I do not see how a company can be bound by a contract made before it was in existence, except by virtue of an Act of Parliament; and then the obligation is imposed by the Act, and not by the contract, and an action must fail which was brought against the company based not upon the Act, but upon the supposed contract. These, however, were clearly not preliminary expenses.

CLEASBY, B. I am of the same opinion. I find that by 25 & 26 Vict. c. 89, s. 14, the memorandum of association may be accompanied when registered with articles of association, "prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." That shews that the articles of association form, as my Brother Martin has said, the constitution of the company. Therefore, I apply to this case what was said by Wilde, B., in *Ornamental Pyrographic Woodwork Co.* v. *Brown* (2): "When the memorandum of association is registered, and the registrar has certified that the company is incorporated, they immediately become a body corporate; and" (he adds) "if there are no articles of association prescribing regulations for the company, the legislature impose on them the regulations contained in Table B.;" but then, in an earlier passage in his judgment, he says that the company "may also, if they please, add to the memorandum of association articles of association, prescribing regulations for the company, and amongst others, a provision that the business of the company shall not be commenced until a definite amount, or the whole capital has been subscribed."

Now, if they may do this, what is to prevent them from inserting

(1) Law Rep. 3 Ex. 180. (2) 2 H. & C. 63, at p. 71; 32 L. J. (Ex.) at p. 193.

such a clause as that now in question? And, if they do, then they are associated and become partners upon those terms, and upon no others. But if, afterwards, the company is to be made responsible upon contracts made in contravention of those terms, such a liability would go to the very foundation of their constitution and terms of association, and that would be treated as a contract with the company which, in fact, never did exist as a contract with them.

BRAMWELL, B. I am of the same opinion. It is clear the author of this document intended to make the shareholders as safe upon this point as language could do, and the shareholders were well entitled to think that he had succeeded. The preamble distinctly contemplates certain expenses; it recites that expenses have been and will have to be incurred in the promotion and formation of the company, and in obtaining from the legislature powers to enable the company to carry out the objects of their undertaking; and it further contemplates the payment of a sum of 2000*l.* to certain persons on behalf of the promoters, "in full discharge for their said claim, down to and including the expenses of the registration and incorporation of the company, and of obtaining the said Act of State or other powers as aforesaid, and the procuring to be subscribed an amount of capital in the said company to the extent of 3000 shares therein at the least;" and also as to 700*l.*, part of the 2000*l.*, for the remuneration of the directors; so that even the sum of 2000*l.* for preliminary expenses is not fully earned until a subscription for 3000 shares has been obtained. Agreeably to this the 62nd clause provides that the directors shall "when, and so soon as 3000 of the shares shall have been subscribed for, pay to Messrs. Easton, Amos, & Sons, the sum of 2000*l.* as before mentioned."

Now the second clause says, "when and so soon as 3000 shares in the company shall have been subscribed for and allotted, the members of the company for the time being shall be and continue associated for the objects of the company; and the regulations for the management thereof shall be in force and binding on such members in like manner as if the whole of the shares into which the nominal capital is divided had been subscribed for and allotted." It is certainly most desirable that effect should be given to this

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clause, if it can legally be held valid; for otherwise no limit can be set to the liability of the shareholders, (short of the full amount of their shares,) if the directors do anything which would, in case of a full subscription being made, and the business of the company properly commenced, be within the general scope of their powers. Now, the clause expresses the event and the terms on which the members are to be associated as members, and they must be associated on that event and on those terms, or on none. How, then, can they be associated for the objects of the company before that event happens?

Is there any legal impossibility in the way of such a provision being effectual? I can see none. The only difficulty lies in the argument that, on registration under 25 & 26 Vict. c. 89, a corporation is, by s. 6, at once formed. But look at the words of the section: "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company." But then, by s. 14, the memorandum of association may be accompanied by articles of association, "prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." Here articles *have* been registered, and these shew the manner in which the members have agreed to form a company; they are not to be, before the 3000 shares are subscribed for, "associated for the objects of the company." Some day they may become so associated; but they cannot be so now, for they have agreed otherwise. If there is any incorporated company now in existence bearing the name of the Jersey Waterworks Company, Limited, the persons who have assumed to act as directors were not empowered to act under its articles of association, but were rather in the position of promoters of a company hereafter to be formed, or, (if already formed so far as to be incorporated,) a company, for which they could not act as directors.

Rule discharged. (1)

Attorneys for plaintiff: *Wilkins, Blyth, & Marsland.*
Attorneys for defendants: *Allen, Colley, & Edwards.*

(1) The demurrers were disposed of without argument.

[IN THE EXCHEQUER CHAMBER.]

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May 19.

THE DUKE OF BUCCLEUCH *v.* THE METROPOLITAN BOARD OF WORKS.

Award—Admissibility of Umpire's Evidence—Injurious Affection of Premises—Substitution of Roadway for River—Loss of "Amenity"—Lands Clauses Act, 1845 (8 *Vict. c.* 18)—*Thames Embankment Act*, 1862 (25 *& 26 Vict. c.* 93)—*Taking of an Easement.*

1QB736
1CPD41

The plaintiff was lessee of the Crown for the residue of a term of ninety-nine years from January, 1855, of a house and premises at Whitehall, together with all ways, easements, and appurtenances whatsoever thereto belonging, or "therewith, or with any part thereof, held, used, occupied, or enjoyed or accepted, reputed, deemed, taken, or known as part or parcel thereof." Until the execution of the works hereafter mentioned the premises abutted eastward on the river Thames, and were bounded by a wall along the whole length of which at high water the river flowed. In this wall was a gate, leading from the garden of the house to a causeway which ran out into the river to low-water mark. The causeway was, and for more than forty years had been, exclusively used by the plaintiff, for landing from the river various articles of household use, and for other purposes.

The defendants in 1863 commenced the construction of an embankment of the Thames, from Westminster to Blackfriars Bridge, under the powers given them by the Thames Embankment Act, 1862, and in the course of working they removed the plaintiff's causeway and a landing place connected with it, and entirely shut off the plaintiff from direct access to the river. Where the water had formerly flowed, a solid embankment, destined for a public highway, was constructed. The plaintiff thereupon gave the defendants, under the Lands Clauses Act, 1845, notice of arbitration and claim for compensation, stating in his notice that he was "owner" of the causeway as lessee thereof, and entitled as such lessee to the use and enjoyment of the landing-place, and of the easements, rights, and privileges belonging thereto, and connected therewith, and claiming compensation for the removal of the causeway and landing-place, and for the depreciation in value of his house and lands, and otherwise injuriously affecting them. The arbitrators referred the question of the amount of compensation payable to an umpire, who awarded 8325*l.* to the plaintiff "as and for compensation for his interest in the said causeway, pier, or jetty, and for shutting up the said landing-place, and for damage by the depreciation of the said house, &c., by the otherwise injuriously affecting the same by the execution by the defendants of the said works, and by the exercise of the powers of the said Act." The award was good on the face of it.

At the trial of an action on the award, the above facts having been proved, the umpire was examined on behalf of the defendants as to the mode in which he had arrived at the sum awarded. He stated that, amongst other items, he had given 5000*l.* for depreciation of the premises in value, and that in fixing that amount

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he had taken into consideration the loss of privacy and "amenity" which the plaintiff had sustained through the defendants' work:—

Held (affirming the judgment of the Court below), first, that the plaintiff's interest in the causeway, as alleged in the notice of claim, was sufficiently established; and, secondly, that the evidence of the arbitrator was admissible.

Held (reversing the judgment of the Court below, by Blackburn, Keating, Mellor, and Lush, JJ., Willes, M. Smith, and Brett, JJ., dissenting), that the plaintiff was not entitled to the compensation given him for the general damage and depreciation in value of the premises caused by the execution of the undertaking, such damage and depreciation having in no way arisen from the severance of the land taken.

Re Stockport Ry. Co. (33 L. J. (Q.B.) 251) discussed.

Rev'd 5 H. L. 418.

APPEAL from a decision of the Court of Exchequer, discharging a rule to enter a nonsuit or verdict for the defendants or for a new trial. (1)

June 22, 23, 1869. *Hawkins, Q.C.* (*Philbrick* with him), for the defendants. First, the evidence of the umpire was properly admitted: *Re Dare Valley Ry. Co.* (2), where Giffard, V.-C., says, "I can see no reason why the arbitrator should not be called as a witness as well as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him." Mistakes in the subject-matter, or in legal principle, were there held to be proper points, and it was only in reference to those that the umpire was questioned on the trial of this cause.

[BLACKBURN, J. It may perhaps be said that in the case cited the Vice-Chancellor was exercising an equitable jurisdiction. The question here is whether the umpire's evidence was admissible in an action brought on the award itself.]

The principle of the judgment applies generally, wherever the arbitrator has exceeded or misconceived his authority. Secondly, his evidence shewed that he had included items of compensation over which he had no jurisdiction. Even assuming that the soil of the causeway belonged to the plaintiff, he would still not be entitled to damages for loss of privacy and amenity to his house, and so far as *Re Stockport Ry. Co.* (3) decides the contrary, it ought not to be held in this Court to have been well decided. It cannot be

(1) Law Rep. 3 Ex. 306, where the facts and pleadings are fully stated.

(2) Law Rep. 6 Eq. 429, 435.

(3) 33 L. J. (Q.B.) 251.

10 Jur. N.S. 816

that taking a yard or two of a man's land can let in a claim for loss of "amenity," which would otherwise be unfounded. This seems to have been the view taken in the Court below by Bramwell, B. (1) But, in fact, that case has no application here, for the plaintiff's interest in the causeway was merely a right of exclusive user. None of his land, therefore, having been taken, the ordinary rules which govern the assessment of compensation for "injurious affection," where no land is taken, must be acted on, and the judgment of Crompton, J., in the case referred to, does not apply. Thirdly, the plaintiff's title to the jetty was not proved at the trial as it should have been. The arbitrator's award is not conclusive upon it, for that deals only with the amount of compensation due, and he cannot determine whether the plaintiff has or has not the interest which he claims: *Horrocks* v. *Metropolitan Ry. Co.* (2); *Brandon* v. *Brandon.* (3) But in this case ownership of the soil was not established, the words of the lease being incapable of conferring it, and the evidence of exclusive user was not sufficient. The causeway was not specifically mentioned in the lease, nor in any way referred to by plan or otherwise.

[WILLES, J., referred to *Berridge* v. *Ward* (4), as shewing that property may sometimes be held to pass by a conveyance, e.g., by presumption of law, as where a close adjoins a highway, although it is referred to neither in the words of the conveyance nor in the plan annexed to it.]

This causeway is between high and low-water mark on the shore of a tidal river, and the presumption of law is that the soil of it belongs to the Crown.

Mellish, Q.C. (*Lloyd, Q.C.*, and *Kemplay*, with him), for the plaintiff. The terms of the lease are sufficient to convey the soil of the causeway, although it is not mentioned in terms nor delineated on the plan. The Crown could convey or lease it, the title to it having been reserved by 20 & 21 Vict. cxlvii., ss. 50, 51 (Thames Conservancy Act, 1857).

[WILLES, J. The plan is by no means conclusive. This causeway, though neither named nor delineated, may have passed under

(1) Law Rep. 3 Ex. at p. 328.
(2) 4 B. & S. 315; 32 L. J. (Q.B.) 367.
(3) 34 L. J. (Ch.) 333.
(4) 10 C. B. (N. S.) 400; 30 L. J. (C.P.) 218.

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the words of the lease, when they are regarded with the other evidence in the case, just as the word "castle" has been held to pass a moat, and as in *Smith* v. *Martin* (1) a garden was held to be parcel of a messuage.]

The words convey, if not the soil, at least an exclusive user, and whichever be the true construction, the plaintiff comes within the principle of *Re Stockport Ry. Co.* (2) The umpire was entitled to include in his award the diminution in value of the premises to the occupier, supposing he were desirous of selling them, and in estimating that diminution the proper measure is the purpose for which the house had been and was to be applied. Now here it was a private residence, and was valuable on account of its situation on the river side. It was that circumstance which gave it a high pecuniary value, securing, as it did, quiet, privacy, and prospect. Nor was this a mere exceptional value to one individual only. It was a value which would be recognized in the market, and it has been entirely destroyed. No doubt the substitution of a roadway is more inconvenient than that of another garden, for example; and the nature of the work to be done is an element which the umpire has to consider in estimating the damages payable. Even independently of *Re Stockport Ry. Co.* (2), the award can be supported (8 Vict. c. 18, ss. 18, 63, 68). The plaintiff's right of access by water is taken away, and that would be actionable. But if so, the umpire's decision as to amount cannot be impeached. (3)

[BLACKBURN, J., referred to *North British Ry. Co.* v. *Tod* (4), where the compensation payable seemed to be assumed to vary with the purpose for which the land taken was to be applied.]

It is reasonable that this should be so. He ought to get more for a disagreeable obstruction, than for one which is agreeable or convenient. (5) With regard to the umpire's evidence, the judgment of Bramwell, B., that it was inadmissible is correct. The award was good on the face of it, and made primâ facie concerning matters within the umpire's jurisdiction, and he ought

(1) 2 Wm. Saund. 400.
(2) 33 L. J. (Q.B.) 251.
(3) See per Bramwell, B., in the Court below, Law Rep. 3 Ex. at p. 328.
(4) 12 Cl. & F. 722.
(5) See per Kelly, C.B., in the Court below, Law Rep. 3 Ex. at p. 325.

not to have been called to explain how he arrived at the sum awarded.

Hawkins, Q.C., in reply.

Cur. adv. vult.

May 19, 1870. The Court differing in opinion, the following judgments were delivered (1):—

BLACKBURN, J. This was an action on an award by an umpire assessing the compensation due to the plaintiff in respect of his claim upon the defendants as promoters of the Thames Embankment Act, 1862, at 8325*l.*, and was brought to recover that sum with interest and the costs of the reference.

The Thames Embankment Act, 1862, incorporates the Lands Clauses Act, 1845; and the umpire was duly appointed under the 68th section of that Act. The verdict was found for the plaintiff, subject to points reserved at the trial, which were raised by the issues joined on the 3rd and 7th pleas, and are distinct.

The 3rd plea sets out the award, which recites the notice of claim made by the plaintiff, and awards 8325*l.* as and for the compensation for the interest of the said Duke of Buccleuch and Queensberry in the said causeway, pier, and jetty, and for the shutting up of the said landing places, and for the damage by the depreciation of the said mansion, house, lands, tenements, and other hereditaments by otherwise "injuriously affecting the same;" and the plea then proceeds to aver that the plaintiff was not interested in, nor entitled to, any compensation as alleged for or in respect of such causeway, pier, or jetty in the said award and the notice therein recited mentioned.

The 7th plea avers that the sum of 8325*l.* was one entire and unseverable sum, and that the said sum includes damages and compensation for matters and things in respect of which the umpire had no power or right to assess damages or compensation, and over and in respect of which he had no jurisdiction. The plaintiff joined issue on these pleas, and obtained particulars of the 7th plea under a judge's order.

On the trial before the Lord Chief Baron, the plaintiff proved the

(1) Hayes, J., died between the hearing of the argument and the delivery of the judgment.

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notice of claim, which is set out in Appendix G. to the case. (1) He also proved the lease of 1810, mentioned in that notice, which granted a term for sixty-two years from 1806 in Montague House. It described the premises as "abutting eastward on the river Thames," and referred to a plan indorsed on the lease.

Neither in the lease, nor on the plan, was there any reference to the causeway or jetty, which at the time when the defendants removed it projected eastward into the river Thames beyond the plan. But the lease granted in general words "all courts, areas, vaults, cellars, sollars, ways, passages, lights, easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said premises or any part thereof belonging or appertaining, or therewith or with any part thereof held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof, or as thereunto belonging;" and evidence was given, that as far back as living memory went, being about fifty years, the causeway and landing place had in fact existed, and been used and kept in repair by the plaintiff and his predecessors.

The plaintiff also put in the two agreements referred to in the notice. By them the plaintiff covenanted with the surveyor for the Crown, on behalf of Her Majesty, to make extensive alterations and improvements on the premises; and the surveyor, on behalf of Her Majesty, covenanted that, on at least 20,000*l.* being spent on these alterations, a further term, to expire in 1960, should be granted. No lease had been actually granted, but an amount of more than 20,000*l.* had been expended, so that the plaintiff was entitled to his extended term in equity, but not at law.

On this evidence leave was reserved to the defendants to enter a verdict for them, "if the Court should be of opinion that there was no evidence of the plaintiff's right or title to or in the causeway or jetty, or the use thereof;" and I think it convenient to dispose of this point before proceeding to the more important and difficult questions arising on the 7th plea. As the umpire was appointed under the 68th section of the Lands Clauses Consolidation Act, 1845, the nature and extent of his authority depends upon the true construction of that enactment. And I think it must now

(1) For the terms of the notice, see Law Rep. 3 Ex. at p. 308.

be considered as settled that neither a jury nor an arbitrator assessing compensation under that section has power to determine whether the party is or is not entitled to the compensation which he claims in his notice. The jury or arbitrator is only to settle the amount of the compensation for what has in fact been done by the promoters in respect of the various things claimed in the notice. After that has been done, if the party seeks to recover the amount, it may be shewn that he is not entitled to compensation in respect of some or all of the matters in respect of which the compensation has been assessed, and then he cannot recover at all in respect of that part to which he is not entitled. And if the compensation has been assessed in one sum in respect of various matters, in respect of some of which he is entitled to compensation, and in respect of others he is not, so that it cannot be ascertained how much was given in respect of what he is entitled to, the assessment is void, and he must have the compensation in respect of those matters to which he is entitled assessed afresh.

This, I think is decided by the cases of *Reg.* v. *London and North Western Ry. Co.* (1), *Read* v. *Victoria Station and Pimlico Ry. Co.* (2), *Horrocks* v. *Metropolitan Ry. Co.* (3), and *Beckett* v. *Midland Ry. Co.* (4), of which decisions I approve. I think, therefore, that this plea was perfectly good, and that the substance of the issue raised on it was, whether the plaintiff had that right to the causeway or jetty which he claimed in his notice, and in respect of which the award gives compensation.

I think that the subject matter of a claim may be so described as to make it essential to prove the accuracy of the description in every respect, so that any variance would be fatal, but I do not think that the description in the present notice is such.

The claim is "to be the owner of the said causeway, pier, or jetty, and also of the said messuage, &c., under or by virtue of a lease, dated the 19th of April, 1810," and two agreements "for a term, whereof ninety years or thereabouts are unexpired." I think it was immaterial, in estimating the compensation, whether the term was legal or equitable, and also whether the plaintiff was owner of the causeway in the sense that he was tenant of the soil

(1) 3 E. & B. 443; 23 L. J. (Q.B.) 185.
(2) 1 H. & C. 826; 32 L. J. (Ex.) 167.
(3) 4 B. & S. 315; 32 L. J. (Q.B.) 367.
(4) Law Rep. 1 C. P. 241.

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on which the causeway was placed, or only had exclusive use of it as a causeway, and so was owner in the sense in which the tenant of a coalpit would be described as owner of the tramway he had laid down where he had only a wayleave; and I do not think the plaintiff has, by the terms of his notice, bound himself down to prove precisely what his title was. I think, however, he has described his claim as being under the lease and agreements, and must prove that; but I think he has given sufficient evidence of it.

Though the terms of the lease of 1810 are such as, taken alone, to lead to the inference that the causeway did not then exist, they are not at all conclusive. The actual existence and enjoyment of the causeway for fifty years (carrying us back as far as 1818) raises an inference that the causeway had existed before. I should, myself, conjecture that it had been made at the time when, as appears by the recitals in the lease, a portion of the Thames was embanked in 1793, though probably not contemplated in the original plan for that embankment, and that it was not mentioned in the lease because it was not brought to the notice of those who framed it that that plan had been so far deviated from. At all events, the evidence would justify the jury in drawing that conclusion. And if the causeway was in existence and used with the premises before the lease, it clearly would pass under the general words as part of what was demised. On this point the Court below were unanimous, and the whole of the judges in this Court agree in thinking that they were right.

The issue on the 7th plea gives rise to questions of greater general importance, and in my opinion of much more difficulty.

5 H. L. 446

The defendants called the umpire as a witness; and from his evidence, which is set out in the case, it appears that in assessing the compensation he took into consideration the taking away of the causeway, and blocking up of the landing place, and some slight structural injuries to the buildings, the direct compensation for which he valued at 250*l.*; and that he also took into consideration that the bringing the promoters' works so near to the plaintiff's mansion, affected its value by taking away the privacy of the garden, &c., so as, in his opinion, greatly to reduce its selling or letting value, and that the compensation for this depreciation formed the residue of the large sum awarded. On this, two points

were reserved, first, whether the evidence of the umpire was admissible at all; and, secondly, whether it shewed that the award had been given for something which the umpire had no power to give. If the plaintiff is right on either of those points, he is entitled to retain his verdict.

The Court below were unanimous in their judgment that the plaintiff was entitled to retain his verdict, but were not agreed in their reasons, the majority, consisting of the Chief Baron and my Brothers Martin and Channell, being of opinion that the evidence of the umpire was admissible, but that it shewed that the umpire proceeded on a right ground, and that the award was good; my Brother Bramwell being of opinion that the evidence was not admissible, but that if admitted, it shewed that the award was made on a principle which he inclined to think was wrong, though he doubted whether the finding of the umpire could be reviewed. And now both questions come before this Court, which is, therefore, required as a Court of Error to decide those points.

The 7th plea itself is not demurred to, and all that we have now to consider is, whether the substance of it was proved. But, in considering this, we unavoidably inquire what that substance is, and so, collaterally as it were, consider whether the plea is good; and it seems to me that it is good.

An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case by a statute, and no other. And from this it follows that if that limited authority has not been pursued and the arbitrator has awarded something beyond the authority, the award is pro tanto void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part. And I think, both on authority and principle, this is a matter which may be pleaded as a defence to an action. In old times the only way of enforcing an award was by action upon it, and the only mode of resisting the enforcement of the award was by pleading to that action, and consequently all the old authorities, to the effect that an award is void for excess of jurisdiction, are authorities that it may be shewn in evidence at the trial under a proper plea. Those old authorities are very numerous;

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it is sufficient to refer to those mentioned in Comyns' Digest, Arbitrament, E. 1. But if the arbitrator had, whilst his authority was unrevoked, actually decided the matter which he was called upon to decide, it was no defence at law to an action on the award that he had misconducted himself, or improperly rejected evidence, or even been induced to come to that decision by the fraud of the plaintiff now seeking to enforce the award; though these facts might afford grounds for obtaining relief in equity, see *Veale* v. *Warner*. (1) A practice arose first in the time of Charles II. of making submissions a rule of court, so as to render any misconduct under that submission, or any refusal to act on the award, a contempt of that court, and so give that court jurisdiction over the award and the parties to the submission; and this practice gave rise to the various enactments under which a court of law now has extensive powers over the reference. Those powers, however, must be exercised by the court in a summary way; and the statutes neither take away any defence given by common law, nor enable any defendants in an action to set up any defence which he could not have so set up before. Accordingly it still remains open to a party to plead to an award any matter which shews that the arbitrator has not pursued his authority; either, in cases where he is required to make a final determination on all matters, by not determining some matter brought before him which he ought to determine: *Mitchell* v. *Stavely* (2); or, by including in his award something which he had no authority to entertain, and which could not be severed from the rest and rejected: *Beckett* v. *Midland Ry. Co.* (3)

Nor is it, I think, any objection to such a plea that the award is good on the face of it, so as to purport to be a decision on all matters which ought to be decided, and only on matters within the authority; though where that is the case it renders it more difficult to prove that the award was, in fact, a decision on matters not within the authority. The award is the judgment of an inferior tribunal having a limited authority, and the law is, I think, accurately stated in the very learned opinion delivered by Willes, J., in *Mayor, &c., of London* v. *Cox* (4): "The judgment of an inferior

(1) 1 Wm. Saund. 327 a., note 3.
(2) 16 East, 58.
(3) Law Rep. 1 C. P. 241.
(4) Law Rep. 2 H. L. at p. 262.

court, involving a question of jurisdiction, is not final. If the decision be for the defendant there is nothing to estop the plaintiff from suing over again in a superior court, and insisting that the decision below had turned, or might have turned, upon jurisdiction. If the decision were in favour of the plaintiff, it is still not conclusive because 'the rule, that in inferior courts and proceedings by magistrates the maxim, omnia præsumuntur rite esse acta, does not apply to give jurisdiction, never has been questioned;' per Holroyd, J., *Reg.* v. *All Saints, Southampton* (1), *Reg.* v. *Bolton* (2), and *Chew* v. *Holroyd*, per Parke, B. (3) And, therefore, not only must the declaration in the inferior court allege jurisdiction, but also, in an action brought in a superior court upon a judgment of an inferior court duly obtained, it must be again averred that the original cause of action arose within the jurisdiction of the inferior court, so that upon a traverse of that averment the question of jurisdiction may be retried." All this, I think, is accurate, and is applicable to the case of an award. "An award or umpirage," says Serjeant Williams (4), "ought in pleading to be stated to have been made pursuant to the submission in form as well as substance;" and this is exactly for the same reason that jurisdiction must be averred in an action on the judgment of an inferior court. In *Mitchell* v. *Stavely* (5), the award was good on the face of it, yet the plea was held good; and to hold that an arbitrator, in fact acting out of his jurisdiction, can estop the parties by untruly saying that he awards of and concerning the premises, would be to stretch the technical rule that one cannot aver against the record much further than any authority warrants. And it is established by *Penny's Case* (6), that though the finding of a compensation jury is good on the face of it, it may be shewn by extrinsic evidence that the jury exceeded their jurisdiction, and the finding may be quashed.

But there is a point which it was not material to allude to in *Mayor, &c., of London* v. *Cox* (7), which it is necessary to notice in the present case.

Though, as is accurately stated, the judgment of a limited tribunal

(1) 7 B. & C. 785.
(2) 1 Q. B. 66.
(3) 8 Ex. 249.
(4) 2 Wm. Saund. 62, note 3.
(5) 16 East, 58.
(6) 7 E. & B. 660; 26 L. J. (Q.B.) 225.
(7) Law Rep. 2 H. L. 239.

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is not final on the question of jurisdiction, yet if that tribunal has jurisdiction, the decision on a point within its jurisdiction (or, as Bramwell, B., in the Court below expresses it, within its arbitrium), whether on the law or the fact, cannot be reviewed except in a court having jurisdiction to sit as a court of appeal from that decision.

Now, it may happen that the same question may arise either as a question of jurisdiction or on the merits within the jurisdiction. It is frequently very difficult to say whether the jurisdiction is exceeded or not. For instances shewing the difficulty of deciding on such a point, see *Reg.* v. *Dayman* (1); *Reg.* v. *Brown* (2); *Bailey's Case.* (3) Now, in cases where an award is good on the face of it, but the arbitrator has made a mistake either of law or fact, if that mistake has been as to a matter within the arbitrator's authority, then, inasmuch as there is no court of appeal from the arbitrator, the mistake cannot be remedied, nor can the court, even in the exercise of its equitable jurisdiction, set aside the award, unless it can be shewn that there was misconduct or some other equitable ground for interference; and in the case of the verdict of a compensation jury, inasmuch as the certiorari is taken away, there is no remedy at law at all unless there be excess of jurisdiction. But if the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. Were this otherwise no one who submits to a reference of one thing could be safe from having an award put upon him as to anything else.

Accordingly, in *Jones* v. *Corry* (4), where the Court of Common Pleas were satisfied that the arbitrator had misconstrued the order of reference and so mistaken the limits of his authority, the award was set aside. This principle is very clearly laid down in the judgment of Lord Chancellor Hart in *Brophy* v. *Holmes.* (5) There,

(1) 7 E. & B. 672; 26 L. J. (M.C.) 128.

(2) 7 E. & B. 757; 26 L. J. (M.C.) 183.

(3) 3 E. & B. 607; 23 L. J. (M.C.) 161.

(4) 5 Bing. N. C. 187.

(5) 2 Molloy, 1.

there had been a reference by order of nisi prius to three jurymen of all matters in difference, and they had awarded in favour of the defendant by an award on all matters in difference, which, therefore, purported to be a decision on all such matters brought before them. The Lord Chancellor had to decide whether this finally disposed of an equitable claim under a guarantee. It appears that the Lord Chancellor was satisfied that, in fact, the claim on the guarantee was brought before the three arbitrators, and that the counsel for the defendant protested that they had no right to consider it, and gave them what is called a "caution not to entertain such a claim." The Lord Chancellor says (at p. 8), "If the arbitrators said we think the guarantee not within our jurisdiction" (i.e., in fact did so, for on the face of the award they professed to decide it), "that would be one case. But if the arbitrators looked at it, and determined it was not a claim that was entitled to have effect given to it, and, moreover, that by reason of having accepted such an undertaking the plaintiff was disentitled to any contribution towards the loss, that is different; and, although I think it was a wrong conclusion, I cannot remedy it." He then, after stating the clear facts and the giving the caution, says (at p. 11): "But the question is, did that caution act before [? upon] the minds of the arbitrators, and did they throw the matter of the guarantee out of their calculation accordingly, or did they disregard it as an empty threat and consider the matter of the guarantee? That is the question; for if it could be shewn that the caution prevented them from exercising their judgment on the guarantee, and the effect of the contract, and the quantum of damages, the plaintiff has not had a fair trial of his claims; but if they disregarded the caution, then the matter has been tried already. But the evidence in this case has been omitted to be pointed to the very fact which alone could entitle a court of equity to interfere after the award. The plaintiff might have examined each of the arbitrators, and put this plain interrogatory to each,—Did you abstain in consequence of the caution, or for any other reason, from weighing the effect of the guarantee; or did you look into it and all the matters in difference between the parties, and conclude on the whole case?" He then proceeds to say that, if there had not been delay, he should have directed an inquiry on that point alone, and, as it was, would con-

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sider whether he should do so or not. Afterwards it appears that, on fresh evidence, he was satisfied that the arbitrators had, in fact, adjudicated on the claim.

It seems clear, therefore, that the Lord Chancellor thought that, though the award was good on the face of it, and purported to be an adjudication on all matters in difference brought before the arbitrators, there might be an inquiry as to whether, in fact, the arbitrators did exercise the jurisdiction, and that the arbitrators themselves might be examined as witnesses as to that fact. There is no case or authority that I can find that says an umpire or arbitrator is either incompetent as a witness or privileged from giving testimony as to any matter material to the issue. Of course any attempt to annoy an arbitrator by asking questions tending to shew that he had mistaken the law, or found a verdict against the weight of evidence, should be at once checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire. I wish to guard against being supposed to express an opinion that a juryman might be asked on what grounds he and his fellows gave their verdict; that involves very different considerations, and may be decided when the case arises. But I can see no reason for the doubt as to whether the umpire's evidence was admissible. And in the recent case of the *Dare Valley Ry. Co.* (1), upon a question closely resembling the present, the Lord Justice Giffard, then Vice-Chancellor, expressed a clear opinion as to the admissibility of the evidence of an arbitrator, and acted upon it.

This brings me to the question of substance in this case, namely, whether the umpire's evidence shews that he was right or wrong, and, supposing him to be wrong, whether the error went to jurisdiction.

This is a question of great general importance, and as there is serious difference of opinion on the point, I think it right to state my reason for the opinion at which I have arrived fully. The umpire acted under the Lands Clauses Consolidation Act, 1845, and, therefore, the extent and limits of his authority must depend

(1) Law Rep. 6 Eq. 429.

upon the true construction of that Act. The only sections which I think material are s. 18, by which the promoters are required to give a notice, stating the particulars of the lands required, and their willingness to treat for the purchase thereof, "and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works;" s. 25, by which any question of "disputed compensation" may be referred; and s. 63, by which it is enacted that in estimating "the purchase-money or compensation to be paid by the promoters" regard shall be had "not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." Section 49 may also be referred to, though not binding on an arbitrator, as it assists in the construction of s. 63. Section 68 does not seem to me to affect the construction of the previous sections. Lord Colonsay, in *Brand* v. *Hammersmith Ry. Co.* (1), observed that "the object in contemplation appears to have been to prescribe the manner in which claims brought forward, under certain circumstances, are to be investigated, not to introduce a new class of parties who were not entitled to come in under the previous sections," and in this I entirely agree.

Now, in the present case, the Duke of Buccleuch was owner of a causeway which was taken by the promoters, and which was severed from other lands, viz., Montague House belonging to the same owner, and the amount of compensation was disputed. The umpire appointed had, therefore, power to determine what should be the compensation or purchase-money of the lands taken, i.e., the causeway, and in estimating that was required to have regard to the damage, if any, sustained by the Duke as owner of Montague House, by reason of the severing of the causeway from Montague House "or otherwise injuriously affecting such other lands (i.e., Montague House) by the exercise of the powers of this or the special Act," and the question is whether he has exceeded

(1) Law Rep. 4 H. L. at p. 209.

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the power thus given to him. It is necessary first to ascertain what the umpire has really done, and in order to ascertain this, the inconvenient way in which the points are raised, obliges us to draw inferences from the evidence stated in the case at pages 3 to 6. (1) The umpire, at page 5, first states the capitalized rent which the Duke would pay for the land over which the Act gives him a right of pre-emption, at 2475*l.*, and then proceeds: "My award was this: loss of jetty 200*l.*; the structural damage to the walls 50*l.*; the capitalized rent of the garden 2475*l.* Then I put it that the expense of building a wall, laying out the gardens, and other matters which the Duke would be put to, would be 600*l.* And then I thought, after all that had been done the house would be of less value to be occupied by a nobleman or a gentleman than it would have been before, by the sum of 5000*l.*"

The capitalized rent of the garden is brought in under a special provision of the Thames Embankment Act; the point which we have to decide is raised as to the 5000*l.*, which is all that we need consider at present.

The umpire, on being further questioned, explains himself at page 6 (2): "I took into consideration the fact that the Duke of Buccleuch's house had, as it stood before, the road on one side in continuation of Parliament Street to Whitehall, but on the other side perfect privacy; and (although the garden is smaller than it will be if the Duke adopts what I thought he would adopt, namely, getting this piece of land) still there was perfect privacy. When the embankment was made the evidence shewed that there would be a roadway, and that roadway would be above the present level of the Duke's garden, and that therefore the only thing he could do would be to build a high wall and shut it out, very much in the same way as the gardens of Buckingham Palace are shut out from the road. There would be traffic, and dust, and dirt, and commotion, and noise, which seemed to me to alter the character of the house entirely. After I had heard all the speeches, and had been a second time to see the place, and had walked round, and had taken into consideration all I could, it seemed to me (although it is quite true that some people might not have the

(1) See Law Rep. 3 Ex. at pp. 313, 314.
(2) See Law Rep. 3 Ex. at p. 315.

same objection to it that others might) upon the whole if a person came there to take that house he would not give for it by 5000*l.* what he would have given for it before."

I think that this discloses a case proper to be laid before the committees of both Houses when discussing the bill, shewing that the execution of the undertaking would inflict damage on the owner of Montague House, and asking the legislature either to stop the undertaking altogether, or make a deviation which would protect him, or insert a special clause to give him compensation. But if such an application was made, it was not successful. And I think it will not be disputed that had not a portion of the hereditaments held along with Montague House been taken, no compensation could under the Lands Clauses Consolidation Act have been given for any of the things mentioned by the umpire as forming the grounds on which he gave the 5000*l.* The loss of privacy and the vicinity of traffic, and dust, and commotion, and noise, from a public road are very likely to affect the value of a house, and so occasion pecuniary loss to its owner, but no action would lie for such loss; and I think it is now established by the decision of the House of Lords in *Ricket* v. *Metropolitan Ry. Co.* (1), that no compensation can be given for anything which would not have been the subject of an action had the statute not made it lawful. Where it is damnum sine injuria the lands are not *injuriously* affected, and no compensation is given, that is of course unless there is a special enactment for the purpose. And I think it is also clear, as a matter of fact, that all these ingredients were wholly independent of the taking of the causeway, and would have inflicted just the same loss and hardship on the owner of Montague House if there never had been a causeway at all, and the embankment and roadway had run alongside of the garden wall, without actually taking any part of the property. It was stated (and I believe perfectly truly) that whether Crompton, J., meant to go so far or not, in practice, his decision in *Re Stockport, &c., Ry. Co.* (2), on which I shall afterwards comment, has been cited as establishing a principle very well stated in the umpire's evidence at page 3 (3): "The claim was put before me in this way;

(1) Law Rep. 2 H. L. 175. (2) 33 L. J. (Q.B.) 251.
(3) See Law Rep. 3 Ex. at p. 313.

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first, they said the Duke's causeway is taken from him; and then they said that therefore lets him in as taking an easement attached to his house, to claim before an arbitrator for the loss and for general damages to the house, including all its amenities of whatever kind they may be." I think that the umpire adopted and acted on this principle, and the question is whether it is good law. It seems to me clear that he did not think or find, or mean to find, that this damage was in any way connected with the taking of the causeway, except in so far as the embankment could not have come so near within taking that portion of land.

I treat the case, therefore, exactly as if the umpire had done what a compensation jury are required by s. 49 to do, that is, had severed the amounts, and then for the purpose of raising the question had found on the face of his award that the compensation for the land taken was 250*l.*, and that damage to the amount of 5000*l.* was sustained by the owner of Montague House in consequence of the execution of the undertaking causing a deterioration in value in that house, and that the undertaking could not be carried out without severing the lands taken from Montague House. The question would then have been raised easily in an action on the award, and would, I think, have been the same which is now raised with some difficulty.

I have by no means made up my mind as to the exact limits of what the umpire might properly consider under s. 63, nor is it necessary to do so if satisfied that he has given too much. And therefore I wish to point out distinctly that my judgment proceeds on the ground that I think the umpire has given compensation for the damage sustained from the execution of the undertaking generally, and that to do so was, in my opinion, beyond his jurisdiction. It does seem a very startling proposition that the taking a portion of land, however small, should entitle the owner to claim compensation for all the damna sine injuria arising from the execution of the undertaking, for which he would otherwise have had no compensation.

Let us suppose that adjoining to Montague House was one of equal size and with a similar garden, but that the garden-wall had run along six inches from high-water mark, and the lease had only been of the garden and its wall, so as to exclude the

bank of the Thames, and that there was no causeway or landing place.

Such a house would be of very nearly the same value as Montague House; the deterioration in value from the execution of the undertaking would be very nearly the same, and yet, inasmuch as the embankment would not touch any part of the hypothetical house, its owner would get nothing, whilst the owner of Montague House, because his causeway worth 200*l.* is taken, gets 8325*l.* I think it would be difficult to explain to that hypothetical owner satisfactorily why he got nothing, whilst his neighbour got so much, and he would probably express a rather unfavourable opinion of the inconsistency of the law, and the irrational distinctions of lawyers, and I think he would be right, for there would be a great anomaly; but I shall endeavour to shew that the law is not open to this reproach, and the supposed anomaly does not exist. If I correctly appreciate the argument against my opinion, it is, that the only reason why the hypothetical owner would not get compensation is, that no words have been used in the Lands Clauses Act to include his case (in effect that his was a casus omissus), and that the hardship in his case ought not to be a reason for imposing a similar hardship on a person whose case is such that the language used may by a fair interpretation include it.

But, after considering this with all the attention due to an opinion entertained by several of the judges, I cannot agree in either position. I think, and shall now endeavour to prove first, that the legislature in passing the Lands Clauses Act did not merely neglect to use words which would include the case of an owner who has suffered damna sine injuria from the execution of an undertaking, but that it was their intention *not* to include any such cases in the Lands Clauses Consolidation Act; and, secondly, that, interpreting the language of the legislature according to the ordinary rules of construction, there is nothing to shew an intention to tack on to the compensation for the land taken compensations for matters in no other way connected with the taking of that land, than that they affect some other land belonging to the same owners; thirdly, I think that the 8 Vict. c. 18, is strictly a *Lands* Clauses Consolidation Act, and nothing else. This is very clearly demonstrated by Lord Colonsay in *Brand* v. *Hammersmith*

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Ry. Co. (1), and to what he says there I refer without repeating it. The bearing of that on the present argument is as follows. The mode of legislation now and for many years adopted where an undertaking is promoted requiring statutable powers, is to refer the bill in each House to a committee who have to hear parties opposing it, and evidence, and decide quasi judicially. Those committees have to determine whether the undertaking is such that for the public good the promoters ought to have parliamentary powers to carry it out, and amongst others the power to take lands. If any one can shew the committee that the amount of private annoyance from the execution of the undertaking will exceed the public good, it is a reason for rejecting the bill altogether. If the private annoyance to a particular individual is shewn to be great, though not sufficient to cause the rejection of the bill, it is a reason for inserting special clauses in favour of that individual. This is alluded to by Lord Campbell in *North British Ry. Co.* v. *Tod.* (2) It is said that the practice of committees is to refuse to hear any one whose land is not taken; that such a person has no locus standi; and it may be that either for this or some other reason the legislature often refuse to insert such clauses where they ought in fairness to do so; for instance, it may be that in the present case the duke has good grounds for saying that he has been harshly used. But the legislature never intended to make their decision in any case subject to review, either by a compensation jury or an arbitrator. The Lands Clauses Consolidation Act is only to come into operation after the special bill has become a special Act, and the legislature have determined that the scheme is for the public good, and that the promoters are to have powers to take lands, and then it provides on what terms these lands shall be paid for, and it provides for that only.

It may be that the scheme of legislation now pursued is not a satisfactory one, and that it would be better not to leave the question whether a person shall have compensation for damna sine injuria so entirely to the committees. It may be that in general that operates with harshness on small owners who cannot afford to appear in Parliament, though that hardship would not exist in the present case. And, no doubt, the committees are not, from their

(1) Law Rep. 4 H. L. pp. 207–10. (2) 12 Cl. & F. at p. 738.

nature, very well qualified to estimate the extent of the damage likely to be sustained in each case.

All these are reasons for changing the scheme of legislation. But whilst it exists it would, I think, be very inexpedient to subject the decision of the legislature to review before a compensation jury or an arbitrator. I am sure that the Lands Clauses Consolidation Act contains nothing to indicate an intention so to do, and I am so far from thinking this is a casus omissus, that I feel very confident that neither house of the legislature would ever have consented to any such proposal. It is one thing to renounce a jurisdiction altogether, and quite a different one to retain it and subject it to an inferior tribunal. Then it seems to me that construing the words of the Lands Clauses Act according to the ordinary rules of interpretation, there is nothing to shew an intention that compensation for the damna sine injuria to other lands held along with the lands taken should be tacked on to the compensation for the lands actually taken, unless the damna are occasioned by the severance, or in some analagous way connected with the taking itself. I agree that the words of the Act should be construed liberally, so as to give full compensation for all that is taken from an unwilling purchaser. I quite agree that where a house has a particular value, as, for instance, from being the place where a trade is carried on, the goodwill of which would be injured by the removal, the compensation should include that, as was determined in *Jubb* v. *Hull Dock Co.* (1), on the construction of a private Act containing clauses to the same effect as those since that time inserted in the Lands Clauses Consolidation Act; but I cannot agree that under the general words in s. 18, "the damage that may be sustained by them" (the parties interested in the property taken), any damage may be brought in; I think it is only the damage arising from the taking or injuriously (that is actionably) affecting the property. Nor do I think the words in the 63rd section, "or otherwise injuriously affecting such other lands," have the extensive meaning attributed to them. The general rule of construction is, that general words following upon particular instances are to be construed with reference to those, and held to be intended to mean something analagous to them—something ejusdem generis. Thus, in a policy

(1) 9 Q. B. 443.

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of marine insurance, after enumerating many perils, the policy proceeds to mention "all other perils, losses, or misfortunes" to the subject of insurance. This is always construed to mean not that the underwriters insure against everything, but only that they insure against such misfortunes as, though not enumerated, are of the same nature as those enumerated. The principle is the same as that on which general words are held to be restrained and qualified by the recitals in the same instrument (see *Lord Arlington* v. *Merrick*)(1), and applying this rule of construction, those general words must be construed as meaning all such damage as is analagous to and of the same kind as that arising from the severance. I think they would probably include such damage, even though it were not, strictly speaking, "injurious;" for instance, if a cutting is made in consequence of which a well is drained, it is not injurious; but if the land in which the cutting was made was severed from the land in which the well was, I should think, though it is not necessary to decide it, that the latter land had suffered a damage, not from the severance indeed, but from something so analogous to it, that it came within these general words as being of the same sort. But I cannot agree that if a railway happened to pass through a field belonging to and occupied with a great posting-house on the turnpike-road, this would authorize the giving of compensation for the loss sustained by the owner of the posting establishment in consequence of the diversion of traffic from that road. I am quite aware of the danger of falling into a fallacy when endeavouring to shew that the argument used on the other side leads to some extreme result, but I do not see how the present case can be supported except on reasoning which would apply to the case of the posting establishment.

The point is singularly barren of authority. The only case that I am aware of directly in point is that of *In re Stockport, &c., Ry. Co.* (2) There the railway company took part of the lands attached to a cotton-mill, and in consequence of the line coming so near the premises there was an increased liability to risk of fire from the passage of trains, and for that the compensation jury gave 300*l.* The late Mr. Justice Crompton had to decide whether it was within the jurisdiction of the jury to give compensation for this head of

(1) 2 Wm. Saund. 411. (2) 33 L. J. (Q.B.) 251.

damage, and he decided that it was. His reasons are thus expressed: "Where the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say it is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which caused the damage; without the Act of Parliament everything you have done, and are about to do, in the making and using of the railway would have been illegal and actionable, and is, therefore, matter for compensation." It is to be observed that this reasoning is confined to the acts done on the land taken itself, and in the case before him the increased risk of fire arose from the engines coming on the land taken, and so bringing fire close to the premises. I have already expressed my opinion, that in many cases, mischief arising from acts done on the land taken may give rise to a claim for compensation under the general words of s. 63, as causing damage analogous to and of the same nature as that arising from severance. I suggested one instance of a well laid dry by a cutting in the land, which, whilst it belonged to the same owner, acted as a reservoir for that well. I may suggest another where the cutting would leave the adjoining land supported sufficiently to stand in its natural state, but no longer able to bear the weight of buildings which could have been erected there if the lands taken had still remained the property of the same owner. Probably the deterioration of the value of the other lands as building ground might be considered as arising from a cause ejusdem generis with that from severance. I am not prepared to say that even a loss of amenity might not sometimes be brought in. In such a case as that disclosed in *North British Ry. Co.* v. *Tod* (1), where a portion of Mr. Tod's land was taken so as to enable the railway company to erect an unsightly embankment, cutting off the view from the windows of his villa (though Lord Campbell seems to suggest (2) that his proper course would have been to obtain a special clause) perhaps the loss of prospect and amenity this occasioned might be considered as ejusdem generis with severance; and other cases may arise in which it may be very proper to take into account the effect of that severance on the amenity of the rest of the premises. And if I could think that the umpire really

(1) 12 Cl. & F. 722. (2) 12 Cl. & F. at p. 738.

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tried to estimate the compensation due to the duke for the severance of his causeway from his garden, and had prodigiously erred in assessing the amount, I am not prepared to say that the award could be questioned. But it would be doing him great injustice to suppose that he did so; I think it quite clear that he applied the principle of the *Stockport Case* (1), as it has been generally understood, that a part of the premises being taken it let in the claimant to have damages assessed for everything. I doubt whether since the decision of the House of Lords in *Brand* v. *Hammersmith Ry. Co.* (2), the decision in *Re Stockport Ry. Co.* (1), can be supported. It is not necessary to form an opinion on this; I think it, however, important to call attention to the reasons of Crompton, J., which are based entirely on the mischief arising from the acts done upon the land taken. I think, if in the extreme case I have supposed before of the railway taking a corner of a farm held along with a posting house, a claim had been made for compensation for the loss arising from the diversion of traffic, and his decision in *Re Stockport, &c., Ry. Co.* (1), had been cited before Crompton, J., in support of it, he would have said, "No; I there thought, rightly or wrongly, that the mischief arose from the acts done on the land taken. Here it arose from no such thing, but from the making of the railway generally, which is quite a different thing."

But though I think the conclusions drawn from *Re Stockport Ry. Co.* (1), go much further than his decision, or the reasoning on which he proceeds justify, yet still those conclusions may be supported on general reasoning, independent of his authority. Before entering on this it may be as well to point out how far the case of *Brand* v. *Hammersmith Ry. Co.* (2), has any bearing on the question. There no lands belonging to the claimants were taken, but the works obstructed their light and air and way, and for that it was admitted that they were entitled to compensation. No attempt was made to tack on the compensation for vibration to the compensation for the lights, air and way; and consequently there was no decision that it could not be so tacked on. All that can be fairly deduced from that case is that the very able counsel employed in it thought it hopeless, and therefore did not try. Yet it is to be observed that, with the exception of the argument founded on the

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 4 H. L. 171.

general words at the end of s. 63, every argument used in this case could have been used there. The railway company could not have come so near Mrs. Brand's house without obstructing her lights. But for the Act of Parliament they could not have obstructed that light without her consent, and if she had been putting a price on the light, she no doubt would have asked a sum that would compensate both for the stoppage of the light and for the vibration. If, therefore, the true principle on which compensation is to be assessed is that the price is to be given which a vendor, who was free to refuse, would reasonably require for taking his property, and so carrying out the undertaking, including in it compensation for the inconvenience he sustained from the execution of the undertaking, it would apply to the taking of lights as well as the taking of lands.

But I think the true principle is, that the price to be given is the price which would be charged by a vendor, who consented to that sacrifice which the legislature have forced upon him, viz., that he shall for the public good bear without compensation all that I comprehend in the phrase of damna sine injuria. In cases where the lands taken are severed from other lands, the 63rd section gives additional compensation. I have already commented upon that section. All that it is necessary to decide is whether it authorizes giving compensation for those things which the umpire has here included.

I am of opinion that the umpire has included the general damage from the execution of the undertaking, though in no way arising from the severance of the lands taken from the rest, and that in so doing he has exceeded his jurisdiction. I come, therefore, to the conclusion that the defendants are entitled to have the verdict entered for them on the issue taken on the 7th plea, and that the judgment should be so far reversed.

My Brothers Keating and Lush concur in this opinion.

MELLOR, J. In this action the plaintiff seeks to recover the sum of 8325*l.* awarded to him by an umpire appointed and acting under the provisions of the Thames Embankment Act, 1862, which incorporated the Lands Clauses Act, 1845. The verdict was entered for the plaintiff subject to the points reserved under the

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issues joined on the 3rd and 7th pleas. I have had the opportunity of reading the judgments prepared by my Brothers Blackburn and Montague Smith, and after much consideration I agree in the result arrived at by my Brother Blackburn, and generally in the reasons upon which it is based.

The facts are set out at length in that judgment, and it is not necessary for me to do more than refer to them.

The Court below was unanimous as to the questions arising upon the issues raised under the 3rd plea, and I believe that there is no difference of opinion amongst the judges who heard this appeal upon those points; I forbear, therefore, to make any observation upon them; but inasmuch as the issues joined under the 7th plea raise very important questions upon which there is a difference of opinion, I desire to express my reasons for concurring with my Brother Blackburn upon those points, and for differing from my Brother Montague Smith, as to one material matter arising under that plea.

My Brother Bramwell, in the Court below, differed from the rest of the judges, as to the admissibility of the evidence of the umpire. Notwithstanding the respect I feel for his opinion, I agree with the majority of the Court below, that the evidence was admissible for the purpose of shewing whether he had, or had not, in fact, exceeded his jurisdiction, by assessing compensation in respect of matters, which, within the true construction of the Acts referred to, were not matters for compensation at all. It would be unfortunate if there were no means of ascertaining whether or not an arbitrator or umpire, in such a case had really confined himself within the true limits of the authority conferred upon him. And whilst I would not interfere in the least degree with the discretion of any arbitrator exercised as to matters really submitted to him, I should on the other hand think it highly unjust and impolitic to decline to interfere where he had in truth "mistaken the subject-matter on which he ought to make his award;" see per Vice-Chancellor Giffard in *In re Dare Valley Ry. Co.* (1); and it must at least occasionally happen, that without the evidence of the arbitrator there would be no means of arriving at the fact; and agreeing therefore entirely with the Vice-Chancellor Giffard,

(1) Law Rep. 6 Eq. at p. 435.

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I can see no reason "why the arbitrator should not just as well be called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him."

Thinking, therefore, as I do, that the evidence of the umpire was properly admitted, the important question arises did he mistake "the subject-matter upon which he ought to have made his award." I am of opinion that he did so far mistake that subject-matter by awarding compensation "for the construction and use of such embankment and highway, as depriving the plaintiff's house of part of its amenity as a residence," and I think that he exceeded his jurisdiction in so doing, inasmuch as such matters, although in a popular sense they might be damnous, yet in point of law were not "injurious." The umpire seems to have relied upon the judgment of Crompton, J., in the case of *The Stockport Ry. Co.* (1) as an authority which in principle authorized him to treat the loss of amenity to the house in question as a subject of compensation.

It becomes, therefore, material to consider whether that judgment of Crompton, J., really does apply to circumstances such as appear in the present case; and if it does, whether it is not inconsistent with the principles upon which the judgment of the House of Lords proceeded in the case of *Brand* v. *Hammersmith Ry. Co.* (2); or, at all events, whether, upon the true construction of the Lands Clauses Act, the distinction is well founded between a case in which some land of the claimant is taken, or some easement is injuriously affected, and a case in which, although the "damnous" consequences are the same, the result is different by reason that no land of the claimant is taken, and no easement injuriously affected.

In the *Stockport, Timperley, and Altrincham Ry. Co. Case* (1) the statement of the facts begins as follows: "Mr. Leigh was the owner of a cotton mill situate on land adjoining to that portion of his land which the company took, and he contended that he was entitled to compensation on account of the increased risk of fire to his mill from the passage of the railway trains, and the execution of the company's works." Now, it is to be observed that the injurious consequences arose from the construction and use of the

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 4 H. L. 171.

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railway on the lands of the claimant contiguous to his mill. They directly sprang from what would have been, but for parliamentary powers of the company, an act of trespass committed on his land.

Now, it may be that where all the injurious consequences arise from an act done on the land the claimant may be entitled to compensation in respect thereof, and yet not be entitled to compensation for damnous consequences which arise only to a small and insignificant extent from an act done upon his land. Suppose there had been no Act authorizing the commissioners to take this jetty, could it be successfully contended that the plaintiff would have been entitled to recover the damages for the loss of amenity resulting to his residence from acts of trespass committed off his land? What reason is there in the present case to suppose that the legislature, in conferring powers to construct an embankment and railway for public objects, and in legalizing the reasonable use of such railway and embankment when constructed, did intend to enlarge the compensation to be paid beyond that which would ordinarily result from the taking and severing of the land of the claimant, by reason of the exercise, as regards such land, of the powers conferred by the Acts under consideration, or, in the words of the 68th section of the Lands Clauses Act, "in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works?" As observed by Lord Colonsay in *Brand* v. *Hammersmith Ry. Co.* (1): "Then the question arises how far that compensation is to go. Is it to go beyond the measure in which they are injuriously affected by the construction of the railway? Is it to be extended to any injury which their property has sustained by the use of the railway?" The cases of *Reg.* v. *Pease* (2), and *Vaughan* v. *Taff Vale Ry. Co.* (3), which were said by Lord Chelmsford, in the same case, to have been rightly decided, and which were, in fact, affirmed by the judgment of the House of Lords, conclusively determine that no liability at law arises from the use of a railway so long as every precaution is taken consistent with its use. It cannot be contended, therefore, that the loss of amenity occasioned by the construction and use of a railway thus authorized can be the sub-

(1) Law Rep. 4 H. L. at p. 212. (2) 4 B. & Ad. 30.
(3) 5 H. & N. 679; 29 L. J. (Ex.) 247.

ject of an action at common law; and unless, therefore, the fact that some land had been taken, or easement of the plaintiff's had been injuriously affected, in the present case makes a difference, it is clear that, according to the cases of *Brand* v. *Hammersmith Ry. Co.* (1), *Penny* v. *South Eastern Ry. Co.* (2), and *Rickett* v. *Metropolitan Ry. Co.* (3), neither the construction of the railway and embankment, nor the reasonable use of them, nor the loss of amenity arising therefrom, could be the subject of compensation.

Can the fact of the company having injuriously interfered with the jetty in question entitle the plaintiff to claim compensation for damnous consequences which could not have been actionable had the jetty not been touched, and which almost altogether result from the general construction of the railway and embankment, and the use thereof, and not from the mere taking and interference with the jetty? I am not aware of any authority for saying that, upon the construction of the Lands Clauses Act, such a consequence follows, unless the judgment of Crompton, J., in the *Stockport Case* (4), and the reasoning upon which it is founded, can be said to be an authority. It has been already observed that in that case all the injurious or damnous consequences, in respect of which compensation was claimed, directly resulted from an act done on the land of the owner.

Now there are cases in which a great distinction exists in respect of injurious consequences resulting from acts done on the land taken, and cases in which no land of the claimant is taken, nor any act done thereon; which distinction is well illustrated by the case of *The Queen* v. *Metropolitan Board of Works* (5), in which case a gentleman claimed compensation against the commissioners for making a sewer outside his land, which tapped a bed of gravel lying in a basin of London clay, and underlying not only the land in which the sewer was constructed, but also the land of the claimant, in which, at great expense, he had formed ornamental waters, which were supplied by springs rising in such bed of gravel, and which were absolutely destroyed by the works of the

(1) Law Rep. 4 H. L. 171.
(2) 7 E. & B. 660; 26 L. J. (Q.B.) 225.
(3) Law Rep. 2 H. L. 175.
(4) 33 L. J. (Q.B.) 251.
(5) 3 B. & S. 710; 32 L. J. (M.C.) 115.

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commissioners. The Court of Queen's Bench, although not agreed on another point which arose on the construction of a statute, were unanimous that the claimant was not entitled to recover, inasmuch as the acts of the commissioners were authorized by Act of Parliament, and were done on land which formed no part of the claimant's property. Now, had the commissioners, in that case, taken the claimant's land, and done the acts on it which caused the mischief, the claimant, I apprehend, would have been entitled to recover.

In the present case, in the Court below, Bramwell, B., did not rest his opinion upon the authority of the *Stockport Case* (1), but proceeded on another ground, and, observing upon the judgment of Crompton, J., said (2): "For it does seem strange that the taking of a piece of a man's land, or even the blocking up one of his lights, should let him in to prove all sorts of damage for which he could not otherwise recover." I should pause before I assented to such a proposition.

The mere loss of amenity has never been recognized as a ground of action by itself; and unless, therefore, in the present case it is clearly included in the words "injuriously affected by the execution of the works," it cannot be the subject of compensation at all.

On these grounds I am of opinion that the judgment of the Court below must be reversed so far as relates to the issue raised under the 7th plea.

MONTAGUE SMITH, J. My Brothers Willes and Brett agree with me in the following judgment. We think with the rest of the Court that the verdict entered for the plaintiff on the third plea should stand, and for the reasons given in the judgment delivered by my Brother Blackburn. We think the plaintiff was interested in the causeway or pier, and that there is sufficient evidence to support a finding that he was possessed of the soil of it.

We also concur with the rest of the Court in thinking that the evidence of the arbitrator was admissible for the same reasons. But on the main question, arising on the 7th plea, we are of opinion that the arbitrator has not exceeded his authority, and that the verdict entered on that plea for the plaintiff should stand.

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 3 Ex. at p. 328.

The arbitrator, as we understand his evidence, has given compensation not only for taking the plaintiff's causeway, and the direct damage arising from the loss of the access to the river from it, but also for the general depreciation in pecuniary and marketable value of the mansion and grounds consequent upon the taking of the plaintiffs' land, and employing it, in conjunction with adjoining land, as a public roadway in close proximity to the mansion and grounds.

The question is, whether the arbitrator has exceeded his authority in giving any compensation for this consequential damage. We are concluded from questioning the propriety of the amount, which is entirely within the province of the arbitrator.

The Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), has, since its passing, been incorporated as a rule with all Acts for making railways, and we believe with most other Acts for constructing works of a public nature where power has been given to take lands compulsorily. Before the passing of this general Act the special Acts, which gave powers for the compulsory taking of land, contained very similar clauses, although not uniformly in the same terms. We understand that since the Act of 1845, the practical construction of it has been, in accordance with the practice under the clauses for the like purpose inserted in the earlier special Acts, to give to the owner, whose land has been taken, compensation for the actual damage his other lands, severed from the part taken, have sustained by the execution of the works. Although opinions have no doubt varied as to the mode of assessing it, we are led to believe that where such other lands or houses have been damnified for residential purposes, and thereby depreciated in saleable and marketable value, compensation in respect of such damage has always been assessed. The evidence taken before a committee of the House of Lords in 1845 may be usefully referred to as to the then existing practice. It will be found in Hodges on Railways, 5th ed. pp. 290–306. That which was the contemporaneous construction of the Act has been followed by the practice of a quarter of a century, and we are to determine whether this construction does such violence to the language of the Act, that we are constrained to hold that all that has been hitherto done under it is wrong, and that millions have been paid as compensation in

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making the great railways of the country, and other similar works, by companies, acting with the highest legal advice, under a mistaken view of the law. We own that it seems to us the construction hitherto adopted in practice does no violence whatever to the words of the Act, but, on the contrary, is entirely consistent with them, and with the intention of the legislature to be collected from the various sections of the Act itself.

The 18th section of the Act requires the promoters to give to the owner, whose land is to be taken, a notice that they are willing to treat for the purchase of the land, "and as to compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." No words can be larger. The 21st section uses the same words, "any damage." The 63rd, a very important clause, contains directions to arbitrators and others. It enacts "that, in estimating the purchase money or compensation to be paid . . . regard *shall* be had . . . not only to the value of the land to be purchased or taken . . . but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act."

In this section the legislature imperatively directs, and obviously for the protection of landowners, that in estimating the purchase-money or compensation to be paid regard shall be had not only to the consequential damage arising by reason of the severance of the lands taken from other lands of the claimant, but also to the damage by reason of such other lands being otherwise injuriously affected by the exercise of the powers of the Act.

These latter words clearly point to damage to such other lands other than, and ultra that, caused by the taking the land, and the severance and the consequences of the taking and the severance, occasioned by "the exercise of the powers of the Act."

It is important to observe that where compensation is assessed by a jury, the 49th clause directs "that the compensation for damage shall be assessed separately from the value of the land," and the direction of the presiding officer must therefore have always given notice to the undertakers of the heads of damage

included in the assessment, and an opportunity of challenging any head erroneously included.

The 68th section relates to the mode of settling the amount of compensation. The words in that section, "lands taken for or injuriously affected by the execution of the works," are large and comprehensive; and although they may not extend, they certainly could not have been intended to limit, the right to compensation provided for by the 63rd clause.

The legislature in thus giving a right to compensation to land-owners for damage accruing to other lands not taken, beyond that flowing from the taking and severance, seems, by necessary implication, to have intended that such compensation should be assessed with some reference to the purpose for which the land was taken, and to which it was to be applied. It appears to us manifest that it was intended, in estimating the compensation to be given to the owner of an entire property for damage by severance and otherwise, by reason of part being taken, that it should be an element of consideration whether the land taken near a mansion and ornamental grounds of the owner was to be converted to a park or flower garden, or used for a railway or gas works, for it is obvious that in the one case the residential character of the property might be little affected, whilst in the other it might be greatly deteriorated or destroyed.

Assuming, then, that the purpose for which the land is taken and to be used may be regarded, the arbitrator was right in inquiring whether by the taking of the jetty for the purpose of a public roadway the other part of the property of the duke was damaged, not only by the severance, but *otherwise* by the exercise of the powers of the Acts; and it seems to us he thus had jurisdiction, if he found the mansion would be depreciated in residential and marketable value by the near proximity of the roadway, to give compensation for such damage, and the amount in that case is entirely for him.

It is further said the arbitrator has given compensation for the damage caused by the roadway along the whole line of the duke's frontage, and has not limited it to so much of the roadway as may occupy the site of the causeway, and that he has been wrong in so doing. The answer is, that in the view we take the damage is

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inseparable in this case, and flows directly from "the execution of the works" (s. 21), and "the exercise of the powers of the Act" (ss. 49 & 63), and was therefore within the words, and as we think the spirit, of the clauses introduced for the benefit of the owner whose land was compulsorily taken from him, for the purpose of the undertaking.

It may be assumed that it was necessary in this case for the defendants to take the plaintiff's causeway, and without taking it they could not have made the roadway at all in the line in which it is made. Now, if without having obtained an Act, they had come to the plaintiff and asked him voluntarily to sell his jetty for this purpose, it may fairly be supposed, even if he were a willing vendor, that he would fix a price that would represent the actual loss and damage to him, that is to say, the amount for which the property of which the jetty formed a part would be depreciated in residential and marketable value by the formation of the roadway for which the land was wanted. Nobody would say that this would be an unreasonable price to fix. Then, is it not fair to suppose that the legislature, in compelling a man to part with his land against his will, did not mean to put him as an unwilling seller, and, on a compulsory sale, in a worse position as regards compensation for such land than he would have been in as a willing seller prepared to sell on reasonable terms for the purpose required.

We have asumed the case of the plaintiff's dealing as a willing seller with the defendants. We will now assume that the defendants, without statutable authority, entered upon the jetty and proceeded to make their roadway. It is, of course, clear that the plaintiff might in such a case have brought successive actions of trespass against them until the nuisance was abated, or might have obtained a mandatory injunction to compel the abatement, or if he was satisfied with damages only, would have been entitled, as of right, to damages for the full injury he had sustained.

Supposing, therefore, the defendants had done what they have done without the authority of Parliament, and that the plaintiff, if a willing seller, might reasonably have demanded a price equivalent to the damage which would be inflicted on his property by the taking of part, and if unwilling might have, by due course of law, altogether stopped the works, or obtained full compensation

in damages, it does to us seem reasonable to expect that the legislature would make provision for compensation in some degree commensurate with the legal rights which they have displaced.

It is said, that a house adjoining Montague House may have suffered nearly the same damage and depreciation, and yet if no land of the owner of it was taken, and no legal right invaded, he must bear the loss without compensation. That may be true, but it does not follow that the legislature is inconsistent, for, neither would such owner have been in the same position as the owner of Montague House, whose land is taken, supposing the roadway had been made without legislative sanction; because, as his property and legal rights would not have been invaded or disturbed, he must have borne the loss without power of redress, whilst his more fortunate neighbour might have made his bargain, or stopped the works, or recovered exemplary damages.

The hardship on the owner of the hypothetical adjoining house arises, because the legislature, probably on account of the distinction above adverted to, has not thought fit to make provision for his case, and such a hardship ought not, we think, to be a reason for a narrow construction of the language of the Act so as to impose the same hardship on the plaintiff whose original rights were different, and where the words as regards his case do, by a fair and natural interpretation, include it.

The distinction referred to is precisely that which both Houses of Parliament make, in the right to oppose bills of this nature before their committees. The owner whose land, however small, is to be taken, is allowed a locus standi to oppose the bill, whilst his neighbour, whose estate, however large, is not touched, has no such locus standi. The practice and legislation of Parliament, therefore, in this respect, if not consistent with perfect equity as regards damnified owners whose lands are not taken, are consistent with each other.

Direct authority on the question is scanty, probably because the practice has been uniform and unquestioned. But the case of *Re Stockport Ry. Co.* (1), decided by Crompton, J., appears to us to be a direct authority in favour of the plaintiff; and we acquiesce in the reasoning by which that very learned judge supports his decision.

(1) 33 L. J. (Q.B.) 251.

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That decision did not establish principles of compensation not before recognized; for, as we have before observed, the practice has always been since the passing of the Lands Clauses Act, 1845, in accordance with that decision, and a vast number of compensations have been awarded or agreed on upon the principles there laid down.

The present case steers clear of the decision of the House of Lords in *Brand* v. *Hammersmith Ry. Co.* (1), and the decisions in other cases where no land was taken. The case of the *Hammersmith Ry. Co.* depended mainly on the 6th and 16th clauses of the Railway Clauses Act, and not on the Lands Clauses Act. In delivering his opinion in that case, Lord Colonsay, who was one of the majority, directly points to the distinction, and excludes the plaintiff in that case from the benefit of the provisions of the latter Act, on the ground that his land was not taken. Again, the difference between the two classes of cases is most clearly stated and explained by Crompton, J., in the *Stockport Case* (2), in language well worth referring to, and we fully adopt his view of the distinction.

The result is that, in our opinion, the judgment of the Court of Exchequer ought to be affirmed.

Judgment on the issue raised by the 3rd plea affirmed, and on that raised by the 7th plea reversed.

Attorneys for plaintiff: *Nicholl, Burnet, & Newman.*

Attorney for defendants: *The Solicitor to the Metropolitan Board.*

(1) Law Rep. 4 H. L. 171.

(2) 33 L. J. (Q.B.) 251.

END OF EASTER TERM, 1870.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXIII VICTORIA.

IN RE GEORGE TIMSON.

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May 26.

Rogue—Vagabond—Frequenting Highway with intent to commit a Felony—5 Geo. 4, c. 83, s. 4.

A public highway is not necessarily a "place of public resort," within the meaning of 5 Geo. 4, c. 83, s. 4.

G. T. was committed to gaol by justices, under a warrant of commitment, which stated him to have been convicted (under 5 Geo. 4, c. 83, s. 4), as "a rogue and vagabond, for that he the said G. T., being a suspected person, did frequent a certain public highway . . . with intent to commit a felony":—

Held, that the commitment was bad, for not shewing that the highway *led* or *adjoined* to any "river, canal, &c.," or to any "place of public resort," or that it was itself a place of public resort.

In re Jones (7 Ex. 586; 21 L. J. (M.C.) 116) followed; *Reg.* v. *Brown* (17 Q. B. 833) not followed.

Where a prisoner is brought up on a writ of habeas corpus, and the return shews a commitment bad on the face of it, the Court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up and amending the commitment by it.

GEORGE TIMSON, a prisoner in custody of the gaoler of the House of Correction for the liberty of St. Alban's, being brought up on a writ of habeas corpus granted by Lush, J., at chambers, it was

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moved to discharge him from custody, on the ground that the commitment set out in the return was bad on the face of it.

The warrant of commitment stated the prisoner to have been convicted before justices of the liberty of St. Alban's as a rogue and vagabond, "for that he the said George Timson, being a suspected person, did frequent a certain public highway at the parish of Aldenham, in the said liberty, on the 27th of April last, with intent to commit a felony and contrary to the statute."

The prisoner was convicted under 5 Geo. 4, c. 83, s. 4, which enacts that "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, . . . shall be deemed a rogue and vagabond."

May 26. *Codd*, in support of the motion that the prisoner be discharged, contended that the commitment shewed no offence within the Act; in the case of *Reg.* v. *Brown* (1), it was held by Lord Campbell, C.J., Coleridge and Wightman, JJ., that the words "leading thereto" and "adjacent" did not qualify the words "street, highway," but only the immediately preceding words "avenue" and "place," so as to make the Act apply to suspected persons frequenting any street or highway, or any avenue leading to a street or highway, or a place adjacent to a street or highway. But this view was dissented from by Patteson, J., who held, as he had previously ruled at chambers (2), that the words "street, highway, or avenue," "street, highway, or place," were all qualified by the words "leading thereto" and "adjacent," which referred back to the antecedent words "river, &c.," and "place of public resort." In *Re Jones* (3), the Court of Exchequer dissented from this judgment of the Court of Queen's Bench, and followed the opinion of Patteson, J., who, in that same case, had at chambers adhered to his

(1) 17 Q. B. 833; 21 L. J. (M.C.) 113.

(2) Anon. 17 Q. B. 834, n.; 15 Just. of Peace, 49.

(3) 7 Ex. 586; 21 L. J. (Ex.) 116.

previous opinion; and, upon the present case being before Lush, J., at chambers, he also expressed his agreement with the decision in this Court. It is submitted that is the true construction, and that the prisoner is entitled to his discharge.

Willis opposed the motion. The commitment here is in exactly the same words as the conviction in *Reg.* v. *Brown* (1), and is covered by the authority of that case. *Re Davis* (2) shews that the justices would have been entitled to find that the highway was a place of public resort, and if they had stated this in the commitment it would have been good. The conviction is not here before the Court, and it is probable that if returned under a certiorari it would be found regular, and the commitment could be amended accordingly. This course appears to have been followed in *Ex parte Cross* (3), and *Rex* v. *Taylor*. (4)

Codd, in reply. In *Rex* v. *Taylor* no habeas corpus had issued, and in *Reg.* v. *Chaney* (5), where the prisoner had, as here, been brought up, that course was not followed. The commitment only is before the Court, and they have no power to amend it. Indeed it cannot be amended, for it has been read; and reading is equivalent to filing, and after a return is filed it cannot be amended: *Rex* v. *Catterall*. (6)

[CLEASBY, B. The contrary is laid down in the subsequent case of *Leonard Watson and Others* (7), referred to in Corner's Crown Practice, pp. 115, 116.]

KELLY, C.B. This commitment is defective, and the prisoner is therefore entitled to his discharge. It only states that the prisoner "did frequent a certain public highway" with intent to commit a felony. But I am clearly of opinion that frequenting a public highway with the intent charged is no offence within the statute of 5 Geo. 4, c. 83, s. 4. Looking at the mere words of the statute and laying aside all dicta or decisions on their construction, I cannot entertain a doubt that when the Act speaks of "frequenting any river, canal, or navigable stream, dock, or basin, or any quay,

(1) 17 Q. B. 833; 21 L. J. (M.C.) 113.

(2) 2 H. & N. 149; see per Pollock, C.B., at p. 150; 26 L. J. (M.C.) 178.

(3) 26 L. J. (M.C.) 201; following *Reg.* v. *Richards*, 5 Q. B. 926.

(4) 7 D. & R. 622.

(5) 6 Dowl. 281.

(6) Fitz. 266.

(7) 9 A. & E. 731, at p. 805.

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wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue *leading thereto*," some proper meaning must be given to the words "leading thereto," which must refer to some previously mentioned place to which the "street, highway, or avenue" leads. But the commitment treats the statute as if these words were not there. Under the next clause indeed, "or any place of public resort, or any avenue leading thereto," it would have been competent to the justices, as laid down in *Re Davis* (1), to find that the public highway frequented by the prisoner was a "place of public resort;" but they have neither stated that it was a place of public resort, nor that it led to such a place. Lastly, it is not found that it is a "street, highway, or place *adjacent*," which again must mean adjacent to the "place of public resort" mentioned just before, and corresponds to the words "adjoining thereto" in the previous part of the clause.

The construction put upon the statute in *Reg.* v. *Brown* (2) by Lord Campbell, C.J., Coleridge and Wightman, JJ., is, no doubt, directly contrary to this view; but I cannot reconcile that decision with the rules of grammar. The words "street, highway, or avenue leading thereto," are construed as if the word "or" were interpolated between the words "street" and "highway," so as to limit the qualifying words "leading thereto" to the single word immediately preceding, and thus make them refer back to the words street and highway, which are treated as independent terms. I entirely agree with the decision of Patteson, J., in that case, which is fortified by the subsequent case of *Re Jones* (3) in this court.

The prisoner is therefore entitled to his discharge; and my only doubt was caused by the case of *Rex* v. *Taylor* (4), where, upon the authority of an old case, Abbott, C.J., says (5): "We must suppose, until the contrary is shewn, that there is a legal conviction to support the commitment. We must have the conviction brought up before we can take any notice of a defect in the

(1) 2 H. & N. 149; 26 L. J. (M.C.) 178.

(2) 17 Q. B. 833; 21 L. J. (M.C.) 113.

(3) 7 Ex. 586; 21 L. J. (M.C.) 116.

(4) 7 D. & R. 622.

(5) 7 D. & R. at p. 624. The case referred to by Abbott, C.J. (*Rex* v. *Hawkins*, Fortescue, 272), was a case on the return of a hab. corp.

warrant;" and adds, "for this purpose you may have a certiorari to bring up the record, and writs of habeas corpus to bring up the defendants." There, on the conviction being afterwards brought up, the prisoner was discharged. But that case is no authority for the present one. Here the habeas corpus has been already granted and the prisoner is brought up under it, and is, with the return, before the Court; and we cannot deal with it as if it were merely an application for a writ made upon matter shewn by affidavits. On the contrary, in the case of *Reg.* v. *Chaney* (1), which was subsequent to the case I have just cited, and which resembled the present in the fact that a habeas corpus had been already granted and the prisoner was brought up upon it, the course described by Abbott, C.J., was not followed, but the matter was decided on the view of the commitment alone. On that authority, I think that all parties being now before the Court, and the magistrates, though served with notice and appearing by counsel, not having thought fit to bring before us the conviction, we ought not to allow the defendant to remain in custody under a commitment which is bad upon the face of it.

CHANNELL, B. I also am clearly of opinion that the prisoner is entitled to his discharge. Apart from the decisions, I entirely agree with the construction put upon the statute by the Lord Chief Baron; and upon questions of habeas corpus it is a well known rule that each Court is accustomed, and indeed considers itself bound, to exercise its jurisdiction according to its own view of the law. I also concur with the observations of the Lord Chief Baron upon the cases cited, which, if the judges are counted, shew a majority of two in favour of the view of this Court. The other question is, whether the matter is ripe for decision, or whether we ought to yield to the application to amend the commitment by the conviction when it shall be brought up, the conviction being assumed to be good. But the case cited in support of that application is essentially different in its circumstances; everything was there in fieri, no habeas corpus having been yet issued; here a return has been made, and in *Reg* v. *Chaney* (1), where also a return had been made, the course suggested in the earlier case

(1) 6 Dowl. 281.

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was not followed. To bring this case within the authority of *Rex* v. *Taylor* (1), the application should have been made to the judge in chambers; but we are now called upon to give final judgment on the return which is in court, and we cannot refuse to do so.

CLEASBY, B. I am of the same opinion. It is no offence within the Act to frequent a public highway with intent to commit a felony. A public highway is merely a place where people have a right to go; it is not necessarily a place of public resort. If it were so, and were thus included in the term "place of public resort," the statute would speak of frequenting a highway, and then again of frequenting a highway adjacent to a highway. It is suggested that it *may* be a place of public resort, and that the magistrates would be justified in so finding. It might well be that they would be so justified, as for instance, if the highway were one where things were exposed for sale, as in *Re Davis* (2); and the justices might, if the circumstances warranted it, have so described the place which the defendant was found frequenting. But we must take the commitment as it stands, and cannot extend the words. Unless, therefore, we are satisfied that a highway *must* be a place of public resort, we must discharge the prisoner.

Prisoner discharged.

Attorneys for prisoner: *Bailey & Pugh.*
Attorneys for justices: *Blagg & Edwards, St. Alban's.*

(1) 7 D. & R. 622. (2) 2 H. & N. 149; 26 L. J. (M.C.) 178.

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June 7.

Succession Duty—"New Succession"—16 & 17 Vict. c. 51, s. 15.

Tenant for life and tenant in tail under a settlement (father and eldest son), in 1855 barred the entail and settled the estates to their joint appointment, and subject thereto to the uses of the earlier settlement. In 1857 they appointed a term to a trustee, after the death of the tenant for life, on trust to raise 20,000*l.* for a younger son, and, by a subsequent deed of 1860, that sum was directed to be raised whether the son did or did not survive his father, the tenant for life. On the money becoming payable to the son upon the death of the tenant for life:—

Held, that the sum of 20,000*l.* was not a succession which, after the Act, had become vested in the son "by alienation or by any title not conferring a new succession," within the 2nd clause of s. 15 of the Succession Duty Act, 1855, and that duty, at 3 per cent., was payable by the son as upon a succession derived from his brother. (1)

SPECIAL CASE, stated under 22 & 23 Vict. c. 21, s. 10, on an information filed by the Attorney General, to recover succession duty upon a sum of 20,000*l.*, under the following circumstances.

The late Marquis of Salisbury was, under his marriage settlement of the 2nd of February, 1821, tenant for life of certain estates, with remainder to his first and other sons in tail.

By a disentailing deed dated the 16th of March, 1855, the Marquis and Lord Cranbourne, his eldest son, barred the entail, and resettled the property to such uses as they should jointly appoint, and subject thereto to the uses of the settlement, and so as to revive and restore the former title.

By a deed dated the 27th of March, 1857, the Marquis and Lord Cranbourne appointed certain of the settled estates to a trustee for a term of 1000 years, after the death of the marquis, upon trust to raise a sum of 20,000*l.*, with interest, for Lord Eustace Cecil (the third son of the marquis) in case he should survive the marquis, with a proviso for the cesser of the term in the event of 20,000*l.* being invested by the persons entitled to the settled estates. By another deed, dated the 20th of August, 1860, the Marquis and Lord Cranbourne appointed that, in a certain event (which happened), the 20,000*l.* should be raised whether Lord Eustace Cecil survived the marquis or not, and should be paid to him, his executors, &c., immediately after the death of the marquis.

(1) See *Attorney General* v. *Littledale*, post, p. 275.

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In 1866 Lord Cranbourne died, a bachelor. On the 12th of April, 1868, the marquis died; the present marquis succeeded to the title and to the estates (which had, after the death of the late Lord Cranbourne, been resettled by the late and the present marquis), and Lord Eustace Cecil became entitled to the sum of 20,000*l.*, which, for the purposes of the case, he was to be treated as having received.

The defendant (Lord Eustace Cecil) admitted his liability to pay duty at the rate of 1 per cent., which he tendered, but the commissioners claimed duty at the rate of 3 per cent.

The question for the opinion of the Court was, whether the amount of duty tendered by the defendant was the amount legally payable in respect of his succession. (1)

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(1) The following are the sections of the Succession Duty Act chiefly referred to in this case:—

16 & 17 Vict. c. 51, s. 2:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of the Act [19th of May, 1853], either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 14:—"When the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them."

Sect. 15:—"Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested *by alienation or other derivative title*, in any person other than the person who shall have been originally entitled thereto, under any such disposition or devolution as is mentioned in the 2nd section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession, at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; *and where, after the time appointed for the commencement of this Act, any succession*

Sir R. P. Collier, A. G. (*Hutton*, with him), for the Crown. The cases of *Attorney General* v. *Braybrooke* (1); *Attorney General* v. *Floyer* (2); and *Attorney General* v. *Smythe* (3), in the House of Lords, carrying out the principle laid down by this Court in *Attorney General* v. *Sibthorp* (4), clearly established these propositions: first, that where tenant for life and tenant in tail in remainder concur in barring the entail, and creating a new estate or interest in the property, the new estate or interest so created is to be considered as derived wholly out of the interest of the tenant in tail, who is therefore the predecessor of the succession; and, secondly, that this is equally so where the new estate or interest is called into existence by the exercise of a joint power created by the new settlement in the tenant for life and tenant in tail, the power being still considered as deriving its force and efficacy from the interest of the tenant in tail. Those propositions apply in terms to the present case, and shew that Lord Eustace Cecil derives his interest in this 20,000*l.* from the late Lord Cranbourne as his predecessor, and must, therefore, under s. 10, pay duty at the rate of 3 per cent. The defendant, however, asserts that by virtue of the second branch of the 15th section he is only liable to a duty of 1 per cent., and contends that the sum in question is a succession which has become vested in him by a title not conferring a "new succession;" that the succession so vested in him is the succession which Lord Cranbourne had; and that he is therefore only liable to pay the same duty which Lord Cranbourne would have paid if he had created no such derivative title, and had survived his father; which duty is, it is conceded, 1 per cent.; inasmuch as Lord Cranbourne derived his original interest as tenant in tail

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shall, before the successor shall have become entitled thereto or to the income thereof in possession, *have become vested by alienation or by any title not conferring a new succession in any other person*, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.
(2) 9 H. L. C. 477; 31 L. J. (Ex.) 404.
(3) 9 H. L. C. 497; 31 L. J. (Ex.) 404.
(4) 3 H. & N. 424; 28 L. J. (Ex.) 9.

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from his father, and s. 12 enacts that a person taking (as Lord Cranbourne would have done) a succession under a disposition made by himself, and made at a time when he was entitled to the property expectantly on the death of any person dying after the commencement of the Act, shall be chargeable with the duty he would have been chargeable with but for the disposition.

But the words of the second clause of the 15th section are in every respect inapplicable to the present case. First, the section speaks only of the vesting of a succession, and this term is not applicable to the creation of a charge upon it. Secondly, to bring the case within the clause, no new succession must be created; but here a wholly new estate has been created, and has been conferred upon a person who had previously no such interest in the property, and that interest is to take effect upon the death of a person dying after the commencement of the Act. This falls exactly within the words of the 2nd section, defining a succession. But, again, at what rate would duty have been payable if *this* alienation had not been made or derivative title created? It cannot be said that only 1 per cent. would have been payable; for although, if Lord Cranbourne had survived and taken the property, he would, taking from himself as predecessor, have paid 1 per cent. under the provisions of s. 12; yet the same disentailing settlement which prevented him from any longer taking under the old settlement, and made him predecessor to himself, also prevented any other person from taking otherwise than from him. If this present alienation had not been made, the whole succession would have passed under the limitation in default of appointment, in respect of which Lord Cranbourne would have stood as predecessor. Suppose a case in which all the limitations in such a resettlement failed (and appointments under a power contained in it are to be treated as such limitations), and the settlor himself died before the succession fell into possession, and a remote relation, within the fifth branch of the 10th section, succeeded as the settlor's heir at law in respect of the ultimate reversion, can it be said that because if the settlor had lived he would have only paid 1 per cent., therefore only 1 per cent. is to be paid by the remote relation; although if no such disentailment and settlement had been made at all, and the ultimate reversion had upon failure of issue been claimed by him as

heir at law to the preceding settlor, he would, perhaps, also have been chargeable with duty at 10 per cent.? Clearly not; and the same question might be asked (for the same consequence would follow) if the person taking the succession when it fell in were the *devisee* of the last settlor's ultimate reversion, and perhaps a mere stranger. Such a construction would be wholly at variance with the intention of the section, and is not called for by its words. On the contrary, the construction of the Crown gives effect to the words, and carries out the general scope of the section, which, in all its three branches, aims at preserving the status quo, and preventing the Crown from being deprived, by subsequent dealings with the property, of the duty to which it has by the statute acquired a vested right, although the actual payment of the duty is deferred until the interest is realized in possession. The first branch treats of dealings before the Act, by way of transfer or transmission of interests; the second branch treats of similar dealings after the Act, but before the falling in of the succession; and the third deals with the extinction of prior interests, by reason of which a subsequent succession falls in earlier than it otherwise would, and where, by reason of the extinguished interests never falling into possession at all, it might have been held that the duty would, but for this section, never become payable at all, and it puts the matter on the same footing as if the interests so extinguished had been transferred so as to keep them alive. Apart, then, from the question whether any new succession was created by this disposition, the defendant's contention that he is only liable to pay what Lord Cranbourne would have paid if he had survived, is untenable.

It is not necessary to put a construction on the words "not conferring a new succession;" it is sufficient to say that, upon the plain words of the clause, any person taking by alienation or other title not conferring a new succession will, if the original owner lives till the succession falls in, pay the duty he would have paid; if, on the other hand, the original owner of the succession dies, and his title passes "by reason of death" to another successor, the person so taking by alienation or other title must pay that which the successor at the time of taking possession would have paid under the 14th section, or otherwise. But if the succession passes by a title conferring a new succession, then it is left either to the

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general operation of the 2nd section, or to the operation of the 14th or any other section modifying the general rule. In other words, the clause provides for cases which are not otherwise provided for, and excludes from its operation those which are.

This agrees with the difference in phraseology between the 1st and 2nd clauses of the 15th section. If, at the time of the commencement of the Act, the succession was already vested in some person other than the original owner, it made no matter whether it had become so vested by a title which would, if it had happened after the Act, have conferred a new succession; a disposition by which a person became entitled on the death of a person dying before the Act, *could* not make a new succession within the definition of s. 2. Therefore the words "not conferring a new succession" would have been meaningless in the first clause, but are intelligible, necessary, and operative in the second.

Mellish, Q.C. (*Wickens* with him), for the defendant. The object of the 2nd clause of the 15th section is to fix the duty, so as to allow of the property being freely dealt with whilst it still remains in expectancy, and a construction must be given to the section which will carry out that obvious intention. It will not be carried out if the construction of the Crown is adopted, for then a purchaser buying the property will contract unknown liabilities. But the defendant contends that, since a succession is defined in the 2nd section as an interest the beneficial title to which depends upon the event of death, a "new succession" must import the introduction of a new life upon the expiration of which some new interest is made expectant.

On this construction, if a new settlement had been made creating a new life interest, as for instance if a life estate to Lady Salisbury had been interposed between Lord Salisbury's life estate and the term created to raise the 20,000*l.*, there would have been a new succession. But if by any alienation not conferring a new succession, or by any other title (as for instance bankruptcy) not conferring a new succession, the existing succession becomes vested in any other person than the person originally entitled, then only that duty is payable which the original owner would have paid.

Now, here, no new life is introduced. All that was done was

that out of the property which would fall into possession at the late Lord Salisbury's death, a new interest was raised, which was to fall into possession at the same time, and which was in substance part of the same thing. It was, therefore, in fact, a vesting of the succession by an alienation, not conferring a new succession, and is within the 2nd clause of s. 15.

[CHANNELL, B. You read the words "not conferring a new succession" as if they qualified the word alienation, but they only refer to the immediately preceding words "any title."]

It seems rather to be supposed that the word "alienation" would not properly apply to any disposition creating a new succession. But if the word is not so expressly or impliedly qualified, yet if the defendant took by an alienation, he is clearly within the section; but if he took by any other title, that was still a title not creating a new succession, and still therefore he is within it. The cases put on behalf of the Crown, where the duty would be lost if effect were given to the defendant's contention, may be answered by corresponding cases where the Crown would gain a benefit by it.

Sir R. P. Collier, in reply. The Crown would not be benefited in any case by the construction of the respondent, for the interest, wherever it is at the time duty becomes payable, must always have come through the hands of the person originally entitled to it, and the duty must have attached upon it in his hands. The only effect of that construction would be to prevent a second or a larger duty from ever attaching.

The argument with respect to purchasers fails; for if a purchaser bought a succession, and before it fell in the vendor died, so that his heir would, but for the alienation, have taken it charged with a new duty in respect of his succession, then by the words of the section the purchaser must pay the same duty as would but for the alienation have become payable, and would be only protected from a double duty by the 14th section, which imposes a duty at the highest rate payable by any of the successors. But, further, there is no warrant for confining the words "new succession" to the insertion of a new life suspending the period of vesting in possession. If the succession taken is not the same as the old one, it is a new succession; and the 12th section, as explained

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by *Attorney General* v. *Braybrooke* (1), shews that even Lord Cranbourne took a new succession by the resettlement, although the event on which his estate was expectant was the same as before.

KELLY, C.B. In my opinion the Crown is entitled to judgment. Many of the questions which arise upon this Act present considerable difficulty, a difficulty which consists chiefly in the application to various and complicated circumstances, of words which are of a wide and general meaning. But the present case appears to me free from doubt, when the words of the Act are carefully considered and compared with the facts which have occurred.

I will first consider what was the succession or interest which was possessed by the first Lord Cranbourne at the time of the passing of the Act. His father was tenant for life, and he was entitled to a remainder in tail. If he had survived his father and succeeded to the estate in its unaltered condition, he would have been liable to pay duty as upon a succession derived from the original author of the settlement under which he was so entitled. But in March, 1855, he joined in resettling the property by a deed the operation of which was to extinguish and destroy that estate which existed in him at that date, and to substitute a new and different estate. The estate tail which existed in him previously then ceased to exist, and out of the interest he acquired under that deed a new estate tail in remainder was created in him, subject to powers and qualifications which rendered it a wholly different estate from that which he had before enjoyed. Now, according to the decisions, that estate was wholly derived from himself, and therefore if he had survived his father, and the question had arisen as to the duty he was to pay, he would, by virtue of the 12th section, have been liable in precisely the same way as if no resettlement had taken place; although a new disposition had been in fact made creating a new estate. But in 1857, the power created by the deed of 1855 was exercised, and a term was created for the purpose of raising the sum now in question, which was carved, not out of the estate which had existed in him previously to 1855, but out of the estate which had become his by virtue of the deed of that year. This disposition, which gave to Lord

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177.

Eustace Cecil an entirely new interest in the property, carved out of the new estate of Lord Cranbourne, and coming into effect upon the death of the late Marquis, clearly created a new succession; and this disposes of the whole argument founded on the 15th section. The second branch of that section is as follows: "Where, after the time appointed for the commencement of this Act any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or *by any title not conferring a new succession* in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created." To make that clause applicable to the present case we must suppose that the term had been carved out of an interest which was in the first Lord Cranbourne at the time when the Act passed; for then, after the Act passed, there would perhaps have been an alienation by Lord Cranbourne of part and parcel of a succession to which he was entitled at the time of the passing of this Act. Here, on the contrary, it was in fact created out of a new succession which came into existence after the Act passed. But the case becomes the more clear from the following words of the clause, "by any title not conferring a new succession," for, obviously, a new succession was conferred on Lord Eustace Cecil. The case is exactly the same as if on the purchase of a property in 1855, the purchaser had created a term out of the estate so acquired by him. Being thus excluded from the operation of the 15th section the case is left to the operation of the 2nd section; it is a succession in which Lord Cranbourne is the predecessor, and the Crown is entitled to duty on that footing.

MARTIN, B. I am of the same opinion, and the case appears to me a clear one. The decisions in the House of Lords have in substance established that when a tenant for life and tenant in tail in remainder, concur in barring the entail and creating an interest, to take effect on the death of the tenant for life, that interest is derived entirely from the interest of the tenant in tail, and not at all from the tenant in life, whose estate is in no way affected. Those decisions are not only binding, but I also assent to them

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as being, in my judgment, rightly decided. Now to apply that principle to the present case. By the 2nd section of the Act every disposition of property, "by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act," is to be deemed a succession, and "the person so entitled" a "successor." Now here, after the Act came into operation, by the deed of 1855, coupled with the deed of 1857, which may be treated as inserted in the deed of 1855, the late Lord Salisbury and his eldest son created a term in trustees to take effect upon the death of Lord Salisbury, for the purpose of raising a sum of 20,000*l.* for the benefit of Lord Eustace Cecil. I cannot imagine a case more directly within the Act; it is a disposition by which Lord Eustace Cecil became entitled to property upon the death of a person who died after the commencement of the Act. He therefore became a "successor." The Act also defines the "predecessor" to be the settlor or other person "from whom the interest of the successor is or shall be derived," and the late Lord Cranbourne was therefore the predecessor.

I agree, however, that if it can be shown that s. 15 alters that which seems the plain result of s. 2, we must construe the whole Act together, and give effect to the proviso. But it appears to me that the clause relied on has no application to the present case; it refers not to the creation of an interest by way of settlement, but to an alienation in the ordinary sense, as if, for instance, the late Lord Cranbourne had sold the whole of his interest to some third person before it came into possession. In such a case the words of the 2nd section would not be apt to describe the condition of things at the time when the interest fell into possession and the duty became payable; and this clause was therefore inserted in order to prevent the Crown from being deprived of the duty by a transaction of that nature. Here, however, we have not the transfer of an old interest, but the creation of a new interest and a new succession in Lord Eustace Cecil, which he derives from his brother, the late Lord Cranbourne.

Whether, inasmuch as Lord Cranbourne, if he had survived without making this appointment, must have paid duty on the whole property, a double duty is not payable, first on the whole

interest out of which this term is carved, and then upon the charge itself, is a matter on which I give no opinion. The point arose in *Attorney General* v. *Peyton* (1), but the matter not being argued on behalf of the Crown, the Court distinctly declined to express any opinion upon it (2); nor are we called upon to express our opinion now.

CHANNELL, B. I am of the same opinion. Without repeating what has been said by the other members of the Court, I think that the case falls within the 2nd section, and that the Attorney General is right in saying that a new succession has been created, which prevents the case from falling within the second branch of the 15th section. It is true that there has been no express decision on the 15th section in the House of Lords, for although it is commented on by Lord Campbell and Lord Wensleydale in the course of their judgments in *Attorney General* v. *Braybrooke* (3), Lord Kingsdown lays it out of consideration, and the other noble and learned lords base their decision not on the 15th but on the 12th section. Their dicta, therefore, relating to this section are not of

(1) 7 H. & N. 265; 31 L. J. (Ex.) 50.

(2) 7 H. & N. at p. 303; 31 L. J. (Ex.) at p. 64.

(3) 9 H. L. C. at pp. 171, 177, 179; 31 L. J. (Ex.) at pp. 184, 187, 188. In the course of the argument in the present case there was some discussion as to how far s. 15 had been the subject of judicial decision. Besides *Attorney General* v. *Braybrooke*, the case of *Attorney General* v. *Rushton* (2 H. & C. 812; 33 L. J. (Ex.) 184) was referred to, where a devisee in fee, subject to a life estate created by the same will, died before the Act, and his son taking as heir at law upon the expiration of the life estate after the Act, was held to have taken by a derivative title from his father, and to be liable under the first branch of s. 15 to pay the same duty which his father must have paid. In the previous case of *Attorney General* v. *Gardner* (1 H. & C. 639; 32 L. J. (Ex.) 84) the Court held that the first branch of s. 15 did not apply to the case of a devise before the Act by a person not liable himself to succession duty, and that his devisee was liable to pay duty as upon a succession created by the devise (see 1 H. & C. at p. 652); Bramwell, B., concurring in the judgment upon the ground that a title by will was not a vesting by alienation or other derivative title (at p. 653). In *Attorney General* v. *Yelverton* (7 H. & N. 306; 30 L. J. (Ex.) 333) where, under a disentailment previous to the Act, a charge of 20,000*l.* had been created in favour of the tenant for life, and the tenant for life settled that sum on strangers, it was held (following *Re Jenkinson* (24 Beav. 64; 26 L. J. (Ch.) 241), Bramwell, B. dissenting, that the stranger, taking after the Act, must pay 10*l.* per cent. as upon a succession derived from the tenant for life, and that s. 15 was not applicable: see 7 H. & N. p. 329. See also the next case, *Attorney General* v. *Littledale*, post, p. 275.

(3) 7 Jur. N.S. 741 (4) 9 Jur. N.S. 281
(5) 3 Jur. N.S. 287. (6) 7 Jur. N.S. 1250.

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binding authority, though they may be of importance in guiding our judgment; but the actual decision in the House of Lords involves principles which govern the case, for they shew that the deed of 1855 created a new settlement. If so, then the Attorney General is right in saying that there was a new succession created, and if that be so, the application of the second branch of the 15th section is excluded. But if the case is withdrawn from the operation of the 15th section, then it is perfectly clear that it falls within the second, and that succession duty is payable accordingly.

CLEASBY, B. I also think that Lord Eustace Cecil has taken a succession, to which he became entitled in possession on the death of the late marquis, and that he took this succession by the act of Lord Cranbourne as the settlor. The answer made to the claim of the Crown is, that though he took this interest from Lord Cranbourne, he only took it as part of Lord Cranbourne's succession, and that, therefore, the second branch of the 15th section applies, and makes the same duty payable which Lord Cranbourne would have paid himself. But, in the first place, I have great doubt whether the succession of the late Lord Cranbourne has to any extent become vested in Lord Eustace Cecil. I am not satisfied that the words apply to a case where the estate does not go over, but a mere charge is created upon it. But if I could see my way to this conclusion, the following words "by alienation or by any title not conferring a new succession," stand in the way of the defendant's conclusion. Now, supposing that, instead of giving 20,000*l.* absolutely to Lord Eustace Cecil on the death of the marquis, Lord Cranbourne had raised the same sum at once, and settled it to the late marquis for life, then to Lord Eustace for life, then to his wife for life, with remainder to his children; clearly, all those coming in after the death of the marquis, would have taken a new succession, and it could not be said as to any of them that they took by "a title not conferring a new succession." What is suggested in substance is, that a person occupying the position of those who would have thus taken new successions ought to be considered as coming in by a title not creating a new succession, but it is impossible to shew why this should be so. That shews that in the present case Lord Eustace Cecil here takes a new succession, and

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is not within the second branch of the 15th section. On both grounds, therefore, I think the Crown is entitled to judgment: first, I am not satisfied that this is a case where the succession of Lord Cranbourne has become vested in any other person; and secondly, if it has, it is by a title which creates a new succession.

Judgment for the Crown.

Attorney for the Crown: *The Solicitor of Inland Revenue.*
Attorneys for defendant: *Nicholson & Co.*

THE ATTORNEY GENERAL *v.* LITTLEDALE AND OTHERS.

July 7.

Succession Duty Act, 1855 (16 & 17 *Vict. c.* 51), *ss.* 14, 15, 18—*Legacy Duty and Succession Duty—Double Duty.*

By a marriage settlement made in 1829, a fund was settled, subject to trusts for the husband and wife during their lives, and for the children of the marriage, and to a testamentary power of appointment in the wife in default of issue, upon trust for the persons who would at the death of the wife have been entitled to the same, under the Statute of Distributions, in case she had died unmarried and intestate.

The wife died in 1831 without issue and intestate, and her mother, H. D., became entitled to the fund under the ultimate trust.

H. D. died in 1832, having bequeathed her property to executors, of whom the present defendants were representatives, on trust for certain legatees, from whom by the Legacy Duty Acts (36 Geo. 3, c. 52, and 55 Geo. 3, c. 184), duty became payable at 3 per cent.

The husband died in 1868, and the bequests under the will of H. D. fell into possession.

The trustees of the settlement paid succession duty at 1 per cent., as on a succession derived by H. D. from her daughter; the Crown claimed also legacy duty on the bequests by H. D. The defendants claimed to deduct the amount actually paid by the trustees, as wrongly claimed by the Crown, but paid the difference:—

Held, that the Crown was entitled to the legacy duty only, and not to double duty.

By Channell and Cleasby, BB.; that by ss. 14 and 18 of the Succession Duty Act, if H. D. had lived till after the Act came into operation, only one duty would have been payable, and that by the 1st clause of s. 15 the same result ensued though she died before the Act.

By Bramwell, B.; that s. 15 does not create or impose any tax, but only shifts the liability; that the section imposing the tax is s. 2; that H. D. having died before the Act, was not a successor within s. 2; that the executors were not within s. 2, as they had no "beneficial interest;" and that if the executors took by a

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derivative title under the first branch of s. 15, they were within the provisions of the Act against double duty.

By Kelly, C.B., that the 18th section did not apply, as there were two "acquisitions," one under the settlement and one under the will; but that the claim of the Crown to double duty was not made out. (1)

Affirmed 5 H. & C. 290

INFORMATION against Charles Richard Littledale, Arthur Littledale, and Harry Thornton, to recover legacy duty, under the following circumstances.

By a settlement made on the 5th of December, 1829, upon the marriage of John Blenkinsopp Coulson and Juliana Elizabeth Dawkins, all the interest of J. E. Dawkins, in certain sums of stock and mortgage debts was assigned to trustees, to be held by them after the marriage (subject to certain trusts for the benefit of Hannah Dawkins, J. B. Coulson, and J. E. Coulson (Dawkins), during their lives, and for the benefit of the children of the marriage, of which there were none), upon trust, if J. E. Coulson should die before her husband (which happened) to raise a sum of 8000*l.* for J. B. Coulson, and as to the remainder of the trust funds (subject to J. B. Coulson's life estate, and to a general power of appointment by will in J. E. Coulson, which was not exercised) in trust for such person or persons as at the decease of the said J. E. Coulson would have been entitled to the same as part of her personal estate, under the Statute of Distributions, in case she had died unmarried and intestate, and without issue.

J. E. Coulson died on the 27th of August, 1831, without issue and intestate, leaving Hannah Dawkins her sole next of kin.

Hannah Dawkins, by her will on the 12th of July, 1831 (after a specific bequest to J. E. Coulson), gave the residue of her personal estate to Charles and Henry Littledale, upon trusts for conversion and investment, and as to the proceeds, if J. E. Coulson should die in her husband's lifetime, then (subject to his life interest, and subject to a power of appointment in J. E. Coulson which was not exercised), as to one-fifth, upon trusts for the benefit of her sister, Mary Thornton, for her life, and of her children after her death; as to another fifth, in trust (in the event which happened) for her brother Charles Littledale; as to another fifth, in trust for her brother Joseph Littledale; as to another fifth, in trust for

(1) See *Attorney General* v. *Lord Eustace Cecil*, ante, p. 263.

her brother Henry Littledale; and as to the remaining fifth, in trust for her nephew John Dixon.

Hannah Dawkins died on the 8th of November, 1832, and her will was proved on the 19th of December following.

Charles Littledale died in 1849, and Henry Littledale in 1866; and the present defendants were the executors of the survivor, and the legal personal representatives of Hannah Dawkins.

J. B. Coulson died on the 12th of June, 1868.

The brothers and sisters of Hannah Dawkins named in her will survived her, and Mary Thornton had children who became entitled to the one-fifth bequeathed to them by the will.

The fund, including dividends and interest from the death of J. B. Coulson up to the 9th of March, 1869, amounted to 90,068*l.*, on which succession duty at 1 per cent. was paid by the trustees of the settlement, under protest. But the Crown claimed also legacy duty at the rate of 3*l.* per cent. (under 36 Geo. 3, c. 52, s. 2, and 55 Geo. 3, c. 184, sch. iii. tit. Legacies 2) on the balance which remained, after deducting the succession duty already paid, and on all dividends and interest accruing due hereafter, until payment of the duty.

The defendants, on the contrary, admitting their liability to legacy duty at 3 per cent., contended that the fund was not liable to succession duty; they therefore claimed to deduct from the legacy duty payable, the amount already paid for succession duty at the rate of 1 per cent., and accordingly paid to the Crown duty at the rate of 2 per cent. only.

June 3. *Sir R. P. Collier, A. G.*, and *W. W. Karslake*, for the Crown. The case is within the first clause of s. 15 of the Succession Duty Act, 1855. (1) At the time appointed for the commencement of the Act, reversionary property expectant on death (viz., the interest to which Hannah Dawkins was entitled expectant on the death of J. B. Coulson) was vested in certain persons (viz., in the executors of Hannah Dawkins' will, holding in trust for the beneficiaries) who were persons other than the person originally entitled (viz., Hannah Dawkins herself), she herself being entitled under such a disposition as is mentioned in the second section. It follows

(1) See sections 2 and 15, ante, p. 264.

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that the same duty became payable as must have been paid by Hannah Dawkins, that is, succession duty at 1 per cent. That legacy duty at 3 per cent. is payable under 55 Geo. 3, c. 184, sch. iii. tit. Legacies, 2, is conceded.

[BRAMWELL, B. Does s. 15 do any more than fix the person who is to pay the duty, supposing the duty to be already imposed? Can you claim duty unless you can bring the case within the second section, and can you do that, Hannah Dawkins being dead when the Act was passed? Suppose Hannah Dawkins had sold her reversionary interest and died, and the purchaser had made a will and died before the Act, upon your construction the devisee under the purchaser's will must have paid the same duty as Hannah Dawkins would have paid if she had survived.]

Certainly; and also duty on the devolution from the purchaser. The section says, that the duty originally payable *shall* be paid. It does not however say that no other duty shall become payable, and, therefore if, as in the case put, another succession takes place before the interest falls into possession, a fresh duty must be paid, except so far as that is interfered with by the provisions of other sections. Under the 2nd section there is a succession wherever by reason of any disposition any person "*has or shall* become beneficially entitled;" the only event which need happen after the Act is the dying of the person on whose life the interest is made expectant.

[KELLY, C.B. Do the words "alienation or other derivative title," refer to a devolution upon death?]

That they do is established by the case of *Attorney General* v. *Rushton* (1), where a devolution by intestacy to the heir at law of a person entitled to a reversionary interest, was held to be a vesting by a derivative title.

[THE COURT, without dissenting from, or assenting to *Attorney General* v. *Rushton* (1), intimated that they did not concur with all that was said by the learned judges in that case.]

The words "derivative title" are meant to supplement the previous word "alienation," and, with it, to include all cases which would fall under the words "disposition" and "devolution" in s. 2. The case, therefore, stands thus: the legatees of Hannah

(1) 2 H. & C. 812; 33 L. J. (Ex.) 184.

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Dawkins, being the persons beneficially entitled, must pay legacy duty according to their relationship to her, that is, at 3 per cent.; the executors or trustees of Hannah Dawkins are persons to whom her reversionary interest has passed by a derivative title, who are to be looked upon as representing her simply, and who are therefore by this section to pay the duty which she would have paid, that is, duty at 1 per cent.

[BRAMWELL, B. But are the executors "beneficially entitled?"]

It is not necessary under the 15th section that they should be; the words "succession" and "successor" are not used, and the section only requires a vesting of the interest by a derivative title in some other person than the person originally entitled. The section provides for a case which the words "beneficially entitled" would exclude from the 2nd section.

[BRAMWELL, B. Suppose the case fell wholly under the Legacy Duty Acts; suppose, for instance, that J. E. Coulson had appointed to Hannah Dawkins under her power, what duty would have been payable?]

Clearly the duty which the Crown now claims, as was decided in *Attorney General* v. *Drake* (1), where a fund was bequeathed by a testator to the appointment by will of his daughter, to whom a life estate in the fund was also given; and, upon the fund being taken by the appointees of the daughter's will, it was held that (the gift of the power of appointment to the daughter being under s. 18 of 36 Geo. 3, c. 52, equivalent to an absolute bequest to her) legacy duty at the rate of 1 per cent. was payable on the bequest to the daughter by her father, and further legacy duty at 3 per cent. on the legacies to the appointees of the daughter's will.

Mellish, Q.C., and *Phillimore*, for the defendants. The case does not fall within the 15th section. When the Act was passed, the legatees were then absolutely entitled to the property, and liable to pay legacy duty upon it, though payment was not yet due (36 Geo. 3, c. 52, s. 12). From the payment of this duty they are not relieved by the present Act.

[BRAMWELL, B. Suppose Hannah Dawkins had been alive when the Act passed, but had died before J. B. Coulson, would not the case have fallen within the second clause of the 15th section?]

(1) 10 Cl. & F. 257.

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Assuming that it would, the case would have been different; there would have been no alteration of a vested right. The fallacy on the part of the commissioners lies in construing the first clause of the 15th section as if there were added to it the words, "and the person originally entitled had survived the passing of this Act." But this section is, in fact, no more extensive than the second; and, unless there has existed since the Act a person who was a successor under s. 2, no duty is payable. If by alienation or by other derivative title (as by bankruptcy or marriage), the interest has been passed away, then, unless the person originally entitled survives so as to be a successor within the Act, the purchaser takes the interest when it falls in, uncharged and unburdened by duty. If, however, Hannah Dawkins was a successor, then the case falls within s. 14 (1); the interest of a successor has, before the successor became entitled to it, "passed by reason of death," to other successors, and therefore only one duty is payable, though at the highest rate of any of the successions. The case is also within s. 18 (2); the legatees were already charged with duties on legacies under the Legacy Duty Acts, and therefore are not, in respect of the property subject to such duties, to be charged with the duty granted by this Act, in respect of the same acquisition of the same property. The case is directly within the decision of Wood, V.C., in *Re Chapman's Trusts* (3), where G. C., having a power of appointment over a fund, subject to his sister's life estate, gave to his sister a power of appointment over one half of the fund, which she exercised in favour of strangers, and it was held that the case fell within s. 14, and that only one duty was payable. The Vice Chancellor there read s. 14 by the light of s. 18; it may also be

(1) 16 & 17 Vict. c. 51, s. 14:—"When the interest of any successor in any *personal* property shall, before he shall have become entitled thereto in possession, have *passed by reason of death* to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them."

(2) S. 18 . . . :—"No person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."

SS. 2 and 15, ante, p. 264.

(3) 2 H. & M. 447.

read by the light of *Lord Advocate* v. *Stevenson* (1), which decided that an heir to Scotch lands, who died within six months of the title accruing, without making up a title or taking possession, was never "beneficially entitled" so as to be a "successor" within s. 2 of the Act.

Sir R. P. Collier, Q.C., A. G., in reply. The 14th section only refers to the passing of successions after the Act, and in *Re Chapman's Trusts* (2) that was the case; both G. C. and his sister died after the Act. The 18th section does not apply, because here there are two separate acquisitions. Both sections apply only to successions strictly so called.

Cur. adv. vult.

July 7. The following judgments were delivered:—

CLEASBY, B. In this case there was much discussion and argument as to whether there was, or was not, a succession in Mrs. Dawkins or her legatees, at the time when the Succession Duty Act (16 & 17 Vict. c. 51) came into operation; Mrs. Dawkins having died before that time. But eventually it appeared clear that this made no difference, because whether there was one succession or two successions, the effect of the 14th and 18th sections was to make one succession duty only payable. The learned Attorney General therefore contended that the case was governed by the first part of the 15th section of the Act, which he said was not applicable to the case of successions, but in a particular event made the duty payable as if there had been a succession, though there was none, and so the 14th and 18th sections referred to, and which applied to two successions, were inapplicable. But, on looking at the words of the first part of the 15th section, it seems clear that the effect of that section is to place the persons in whom Mrs. Dawkins' interest became vested at the time of her death, in the same position as she would have been in if she had lived till the Act came into operation. The section says expressly that the duty is to be payable at the same time as if no alienation had been made or derivative title created. If Mrs. Dawkins had lived until the Act came into operation, it was hardly disputed by the learned Attorney General, that whether she died before or after the tenant for life,

(1) Law Rep. 1 H. L., Sc. 411. (2) 2 H. & M. 447.

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only one duty would have been payable, and the same result follows by the effect of the 15th section, though she died before the Act came into operation.

We entirely adopt the view taken by Wood, V. C., in *Re Chapman's Trusts* (1), that when there are two successions to the same property, and legacy duty is payable when it comes into possession, only one duty is payable.

There will, therefore, be judgment for the defendants.

CHANNELL, B., concurred in the above judgment.

BRAMWELL, B. I am of opinion our judgment should be for the defendants. The question is, whether the Crown is entitled to succession duty in respect of the property, the subject of the suit, in addition to legacy duty to which it is clearly entitled. In my opinion the solution of this question must be sought in s. 2 of the Succession Duty Act. It is true the counsel for the Crown did not rely on that section; nevertheless, we must examine it. It is undoubtedly retrospective. But to hold that Mrs. Dawkins was "a person" within the meaning of that section, would be to say that the legislature had imposed a tax on a person dead many years before the imposition. If it is said her executors are such "persons," then they have no beneficial interest; and they and the property are no more liable than all other executors and properties. But it is not pretended that, as a rule, executors are liable. The counsel for the Crown, then, were quite right in not relying on this section. The section they really did rely on was s. 15. But, in my judgment, that section *creates* or *imposes* no tax or duty. Its object is to say who is to pay in certain cases, and how much. In cases of alienation or derivative title, it puts the duty on the alienee or other person derivatively entitled; whereas but for that section, it might have been said the alienor or original successor was liable; and it says the duty shall be at the rate he would be liable to, and not the rate the alienee would be liable to, which otherwise might have been doubtful. Whether an executor's title is "derivative," it is not necessary to determine. It is not so under that section, i.e., executors do not pay one duty and the legatee another. If they *are* within the meaning of that section, if

(1) 2 H. & M. 447.

this case is within the words of the statute imposing a succession duty, then the provision against double duty applies; and on the construction of the statute, and the authority of *Re Chapman's Trusts* (1), the defendants are not liable to this double duty. It seems to me the case may be made plain thus: Suppose the property had been realty, then, unless we hold the deceased woman a successor taxed long after her death, there clearly would have been one succession only, viz., that of the defendants to the testatrix, without the intervention of the executors. Then, why should s. 15 impose a duty on personalty when it does not on realty? No reason can be given. In my judgment, the defendants are entitled to succeed.

KELLY, C.B. I cannot but entertain much doubt upon this case; for I think that there were two successions here: one under the original settlement, the other under the will of Mrs. Dawkins; that consequently there were two acquisitions, and that the 18th section does not apply. If this be so, the 15th section, which I agree imposes no new and separate liability, but is an important exposition of the 2nd section, shews that if Mrs. Dawkins had been alive when the Act came into operation, she would have been a successor, and liable to duty in respect of the succession under the original settlement, while the defendants would be successors also in respect of the succession under the will of Mrs. Dawkins. This latter succession being to money under a will, would be liable to legacy duty, and so exempted from succession duty under another branch of the 18th section; but the former succession under the settlement still remains, and to this the succession duty would have attached if Mrs. Dawkins had survived. But the death of Mrs. Dawkins before the Act distinguishes this case from all which have hitherto been decided, and raises a doubt which, upon a question of liability to a new tax, I am content should be resolved in favour of the subject and against the Crown. There will, therefore, be judgment for the defendants.

Judgment for the defendants.

Attorney for Crown: *The Solicitor of Inland Revenue.*
Attorney for defendants: *Walters & Co.*

(1) 2 H. & M. 447.

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June 24.

[IN THE EXCHEQUER CHAMBER.]

CRANWELL *v.* THE MAYOR, COMMONALTY, AND CITIZENS OF LONDON, AND OTHERS.

Compensation for Lands compulsorily Taken—Notice requiring Possession—Tenant from Year to Year—City Improvement Act, 1847 (10 & 11 *Vict. c. cclxxx.*), *s.* 34—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 121.

By s. 121 of the Lands Clauses Consolidation Act, 1845, if lands in the possession of a tenant from year to year are taken compulsorily, and such person is required to give up possession before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain.

Under a local Act, incorporating the above section, the defendants, in November, 1865, served upon the plaintiff, who held certain premises as yearly tenant, a notice stating their intention to take the premises, and requiring possession in six months. In fact, possession was not taken by the defendants until 1867, and the plaintiff meanwhile remained in possession, and continued to carry on his business upon the premises. In January, 1867, the defendants took an assignment of the interest of plaintiff's landlord (the lessee for a term of the premises), but no landlord's notice to quit was ever given to the plaintiff. In February, 1867, the defendants demanded immediate possession of the plaintiff's premises, declining to pay any compensation, and, upon refusal, obtained possession under a provision of their local Act, which, however, required that no such possession should be taken until payment or deposit of purchase or compensation money should have been made. The plaintiff having sued them in trespass:—

Held (affirming the judgment of the Court of Exchequer), that the plaintiff was entitled to compensation; and that the defendants had, therefore, not complied with the provisions of their local Act, and were liable in this action.

Reg. v. *London and Southampton Ry. Co.* (10 Ad. & E. 3) commented on.

ERROR from the judgment of the Court of Exchequer in favour of the plaintiff, on a special case stated in an action of trespass, which was brought to recover damages for an entry by the defendants upon the plaintiff's premises, under the authority, as they contended, of s. 34 of the London (City) Improvement Act, 1847.

The London (City) Improvement Act, 1847 (10 & 11 Vict. c. cclxxx.) s. 1, incorporated the Lands Clauses Consolidation Act, 1845, but s. 19 excepted from that incorporation so much of the Act as related to the purchase of land otherwise than by agreement; s. 13 gave power to the defendants to take houses and land for the purposes of the Act; and by s. 34 it was enacted as follows:

—"All persons in the actual possession of any lands to be taken or purchased by virtue of this Act, as owners, leaseholders, tenants at will, or lessees for a year, or for any shorter time, or otherwise, shall at the expiration of six months from and after notice in writing from the mayor, aldermen, and commons, or their agents duly authorized, shall have been left at or affixed upon the premises, or so soon after as they shall be required so to do, peaceably and quietly deliver up the possession of the said premises to the mayor, aldermen, and commons, or the person authorized by them to take possession thereof; and in case any such persons shall refuse to give up such possession as aforesaid, then it shall be lawful for the said court of mayor and aldermen to issue their precept to the sheriffs of the said city of London to deliver possession of the premises to such person as shall in such precept be nominated to receive the same; and the said sheriffs are hereby required to deliver such possession accordingly of the said premises, and to levy such costs as shall accrue from the issuing of such precept on the persons so refusing to give up such possession as aforesaid, by distress and sale of their goods, *but no such possession shall be delivered up until such payment or deposit of purchase or compensation money shall have been made as is described by the Lands Clauses Consolidation Act*, 1845."

The Lands Clauses Act, 1845 (8 Vict. c. 18), s. 121, enacts that if any lands taken "shall be in the possession of any person having no greater interest therein than as tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain."

The Holborn Valley Improvement Act, 1864 (27 & 28 Vict. c. lxi.), authorized the compulsory taking by the defendants of (amongst others) the house and premises, No. 23, Skinner Street, for the purposes of the Act; and by s. 5, enacted that (inter alia) "all the powers, authorities, restrictions, provisions, and savings" contained in the London (City) Improvement Act, 1847, except s. 19, and in the Lands Clauses Consolidation Act, 1845 (except

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the part relating to the purchase and taking of lands otherwise than by agreement), should extend and be applied to that Act with reference to the taking of lands.

The plaintiff carried on business at No. 23, Skinner Street, in premises which he held as yearly tenant under one Paxon (the lessee of the house of which the plaintiff's place of business formed part), the tenancy commencing at Christmas. On the 29th of November, 1865, the corporation served the plaintiff and Paxon with notice of their intention to take the premises, and their willingness to treat for compensation, and required possession in six months. The plaintiff sent in his claim, which was inquired into, and the plaintiff's calculations were examined by accountants on behalf of the committee of the corporation, but no agreement was come to.

By a notice, dated the 14th of January, 1867, the corporation summoned the plaintiff to attend before an alderman for the purpose of having the question of compensation heard and determined.

On the 30th of January the corporation took an assignment of Paxon's interest, and entered upon the premises, but did not take possession of that part of the premises which was occupied by the plaintiff. At the hearing of the summons on the 12th of February, the corporation contended that the plaintiff had not been required to give up possession before the expiration of his interest within s. 121 of the Lands Clauses Consolidation Act, 1845. The alderman allowed the objection, and (the matter standing over to the 19th) ultimately determined that the plaintiff was not entitled to any compensation, and declined to state a case.

On the 25th of February the corporation demanded possession, and, upon the plaintiff's refusal, issued their process to the sheriffs, to deliver possession of the premises to their nominee, under which possession was accordingly delivered on the 16th of March.

The present action was brought against the corporation, the sheriffs, and the nominee of the corporation, to recover damages for this alleged trespass. In the sittings after Trinity Term, 1869, the Court of Exchequer gave judgment for the plaintiff, on which the defendants brought error.

Hardinge S. Giffard, Q.C. (*Thesiger,* with him), for the defend-

ants. The case of *Reg.* v. *London and Southampton Ry. Co.* (1) is in point, and shews that, as the plaintiff chose to stay in after the expiration of the six months, he had no right to compensation; he took the benefit of his occupation in lieu of the compensation he would otherwise have been entitled to. He has, indeed, remained in beyond the time at which he could have been turned out by a landlord's notice to quit; and, under these circumstances, the notice given had practically the same effect.

[BLACKBURN, B. In the case cited, it appears to have been thought by the Court that there was some agreement between the parties which disentitled the tenant to claim compensation.]

No such fact appears in the affidavits as stated in the report.

Lloyd, Q.C. (*Littler*, with him), for the plaintiff, was not heard.

WILLES, J. The judgment of the Court below must be affirmed. It is requisite to consider the position of the plaintiff from two points of view: first, in his relation to his landlord as tenant from year to year; and secondly, in his relation to the corporation as the owner or occupier of premises which are taken by them to make way for improvements. Looking at the matter from the first point of view, if notice to quit had been given him by his landlord, he could not have been turned out before Christmas, 1867. Perhaps, moreover, his landlord would not have given any such notice; at any rate, no such notice was given. The corporation, however, were entitled (under s. 34 of their Act) to give at any time a six months' notice requiring possession, and such a notice was given in November, 1865, and therefore came into force in May, 1866. The notice, however, was not acted upon by taking possession under it, until the following year; but in February, 1867, the plaintiff was forcibly expelled from his premises under an order made on the supposed authority of the statute. During the whole period, after the expiration of the six months, the plaintiff remained in possession, subject to a liability to be turned out at a moment's notice, provided payment were made by the corporation of the purchase-money due to him, if any, and he was entitled to compensation, at the least, for the difference between such a possi tion, which was that of a mere tenant at sufferance, and the

(1) 10 Ad. & E. 3.

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position of a tenant with a right to retain possession till a fixed and definite period. The amount of compensation may be more or less, but we cannot affirm that the interest of which the plaintiff was deprived, could not be worth anything; and therefore the alderman, who clearly meant to decide that there could be no compensation—not, that in point of fact, the plaintiff's interest was not worth anything—was in error. The change in the character of his occupation was a matter for which the plaintiff was entitled to be compensated.

It is not surprising, however, that the alderman should have thought himself justified in the conclusion he arrived at, having regard to the case of *Reg.* v. *London and Southampton Ry. Co.* (1), where the Court of Queen's Bench refused a rule to assess compensation under circumstances which, at first sight, seem similar to those of the present case. In fact, however, the cases differ; for there, before the tenant went out, a transaction took place between the parties which led the Court to the conclusion (whether rightly or wrongly, it is unnecessary to consider), that the tenant had accepted an equivalent or satisfaction for the disturbance of his possession, or that something had passed between them which disentitled the tenant to demand damages by way of compensation. This is what the statement at the end of the judgment (2), appears to amount to, namely, that the tenant consented to remain in after the six months, by way of satisfaction, and that the defendants having, meanwhile, acquired the position of landlords, the notice, under the whole circumstances of the case, had the same effect as if it had been a landlord's notice, and therefore deprived the plaintiffs of a right to compensation. No evidence of any such arrangement is to be discovered in the present case; and the plaintiff is therefore entitled to compensation for the value of his interest whatever it may be.

BLACKBURN, KEATING, MELLOR, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *J. Pontifex.*

Attorney for defendants: *The City Solicitor.*

(1) 10 Ad. & E. 3.

(2) 10 Ad. & E. at p. 10.

KREHL AND ANOTHER, ASSIGNEES, *v.* THE GREAT CENTRAL GAS CONSUMERS' COMPANY AND MUSIS (P. O.).

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June 9.

Bankruptcy—Protected Transactions—12 & 13 *Vict. c.* 106, *s.* 133.

By an agreement in writing between a guarantee society and H., after reciting that H. was about to enter the service of a gas company, the Guarantee Society agreed with H. to indemnify the gas company to the extent of 250*l.* against any loss that might occur through his dishonesty, and H. agreed with the Guarantee Society that if they should receive any notice of any irregularity, default, or claim intended to be made under the guarantee, it should be lawful for them by their officers, or any person authorized by them, to enter H.'s house, and take possession of his goods; and, in case they should be called upon to make any payment under the guarantee, to sell the goods for their own indemnification. The guarantee was given accordingly, and H. having afterwards been guilty of dishonest conduct, the gas company called upon the Guarantee Society to pay the sum guaranteed. Thereupon the society and the company by their authority, entered and seized H.'s goods. Meanwhile H. had committed an act of bankruptcy, but of that, at the time of entry and seizure, neither the Guarantee Society nor the gas company had notice. H. was subsequently adjudicated bankrupt, and his assignees brought an action against the Guarantee Society and gas company for the entry and seizure:—

Held, that the agreement and the entry and seizure of H.'s goods under its provisions, constituted a "transaction" with the bankrupt protected by the 12 & 13 Vict. c. 106, s. 133, and that the plaintiffs were not entitled to recover.

DECLARATION by the creditors' assignees of Benjamin Higgs, a bankrupt, against the defendants, the Great Central Gas Consumers' Company, and James Musis, the public officer of the Guarantee Society, first, in trespass for breaking and entering the house of the plaintiffs, as assignees, and carrying away goods which belonged to them as assignees; secondly, for the wrongful conversion of the goods of the plaintiffs as assignees.

Plea, that before the bankruptcy, and before the Bills of Sale Act, 1854 came into operation, by an agreement in writing made between Benjamin Higgs and the defendants, the Guarantee Society, after reciting that Higgs was about to enter the service of the other defendants, the Gas Consumers' Company, and had applied to the Guarantee Society to give their guarantee to the gas company to the extent of 250*l.* against any loss that might accrue to them from the fraud or dishonesty of Higgs, and that the Guarantee Society had consented to give such guarantee, the Guarantee

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Society agreed with Higgs to indemnify the gas company, and Higgs thereby expressly agreed that, in case the Guarantee Society should receive any notice in writing of any default or irregularity, or of any claim made, or intended to be made, under or by virtue of any such guarantee as aforesaid, it should be lawful for the Society forthwith, or at any time thereafter, with or without any previous notice to Higgs, in a summary manner by themselves, or any of their clerks or officers, or by any other person or persons on their behalf to enter into any house or other premises of Higgs, or elsewhere, where practicable, where any goods, chattels, &c., belonging to Higgs, might then happen, or might be supposed, to be, and to take possession of such goods, chattels, &c., and either to remain in such possession on the premises, or to remove the same or any part thereof for safe custody to such place as the Guarantee Society should think fit; and in case the Society should make, or be called upon to make, any payment in respect of any claim under the guarantee for loss or damage as aforesaid, it should be lawful for them to sell the goods, chattels, &c., at their discretion, in such manner as they should deem most eligible for their own indemnity and reimbursement. Averment, that the defendants, the Guarantee Society, did give a guarantee, as aforesaid, to the defendants, the gas company, and all conditions were fulfilled, &c., necessary to entitle the defendants, the Guarantee Society, to exercise the power in the agreement contained, and to break and enter the house and premises of Higgs, and seize and carry away and sell his goods, chattels, &c., under the licence, and power in the agreement; and thereupon the defendants, the Guarantee Society, on their own behalf, and the other defendants, on behalf and by the authority of the Guarantee Society, bonâ fide in the exercise of the power and licence in the agreement contained, and without notice of any act of bankruptcy committed by Higgs, and before the filing of the petition for adjudication, broke and entered his house and premises, and seized and carried away his goods and chattels, and converted them, which are the grievances complained of.

Demurrer, and joinder in demurrer.

Day (*T. E. Holland* with him), in support of the demurrer. The

question is whether the arrangement alleged in the plea is a "contract, dealing, and transaction" with the bankrupt, protected by 12 & 13 Vict. c. 106, s. 133. (1) It is not; it is a mere licence by Higgs to the Guarantee Society to seize his goods in a certain event. Before the goods were seized Higgs had committed an act of bankruptcy, so that the seizure was in no sense a contract, dealing, or transaction "with the bankrupt." The goods had then become the assignees', but even if they had been Higgs', the seizure under the licence could not have come within the protection of the section. It was neither a contract, dealing, or transaction. The last is a wide word, but must be taken to refer to matters ejusdem generis with "contract" and "dealing:" *Graham* v. *Furber*. (2)

Sir J. B. Karslake, Q.C. (*Watkin Williams* with him), for the defendants. The giving of the licence, and the subsequent action taken under it, must be looked at together, as parts of one and the same "transaction," a word of the widest significance, which includes any negotiation or dealing: *Brewin* v. *Short*. (3) These goods never became the property of the assignees. They were seized under what was a continuing security: *Holroyd* v. *Marshall* (4); *Brown* v. *Bateman* (5); *Carr* v. *Allnatt* (6); and therefore the transaction was "with the bankrupt."

[MARTIN, B. The "transaction" ought not to be confined to the act of entering to seize the goods. It includes the whole of

(1) The 12 & 13 Vict. c. 106, s. 133, enacts (inter alia) that "all contracts, dealings, and transactions by and with the bankrupt, really and bonâ fide made and entered into before the date of the fiat or the filing of a petition for adjudication in bankruptcy, . . . shall be deemed to be valid notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with such bankrupt . . . had not at the time of such contract, dealing, or transaction, notice of any prior act of bankruptcy by him committed." This section is now repealed by 32 & 33 Vict. c. 83. The corresponding section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 94), enacts that "nothing in this Act shall render invalid . . . (3) any *contract or dealing* with any bankrupt made in good faith and for valuable consideration before the date of the order for adjudication by a person not having at the time of making such contract or dealing notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(2) 14 C. B. 134; 23 L. J. (C.P.) 10, 51.

(3) 5 E. & B. 227; 24 L. J. (Q.B.) 297.

(4) 10 H. L. 191.

(5) Law Rep. 2 C. P. 272.

(6) 27 L. J. (Ex.) 385.

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the arrangement between the parties from the contract by Higgs with the Guarantee Society downwards.]

Regarded in that view, it clearly falls within 12 & 13 Vict. c. 106, s. 133, and within the decision in *Young* v. *Hope* (1), and *Hope* v. *Hayley*. (2)

Day, in reply. The cases relied on turn on the true construction of the "order and disposition" clause of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106, s. 125), and do not apply to goods which, up to bankruptcy, had been the bankrupt's own: *Cooke* v. *Hemming*. (3)

KELLY, C.B. The question in this case is, whether the taking possession of certain goods under the circumstances stated in the plea demurred to is a "transaction" with the bankrupt, Benjamin Higgs, which is protected by the 133rd section of the Bankruptcy Act, 1849, and therefore valid as against the assignees. Now the facts stated amount to this: that a valid agreement had been entered into between Higgs and the defendants, the Guarantee Society, whereby the Guarantee Society were licensed and empowered upon a certain event to enter on the premises of Higgs, and hold his goods as a security for their liability to the other defendants, the British Consumers' Gas Company. The event happened, and the Guarantee Society entered under the agreement and took possession of the goods. Meanwhile Higgs had committed an act of bankruptcy, of which the defendants had no notice; and after the defendants had seized the goods he was adjudicated bankrupt. Unless, therefore, the transaction was within the meaning of 12 & 13 Vict. c. 106, s. 133, the goods would belong to the assignees, and the whole question is, whether or not that section applies to this case.

Now it has been urged that the transaction was not "with the bankrupt;" and it is true there was no delivery of the property by him personally, and very possibly he was absent when possession was taken. He certainly intervened in no way in assisting the defendants to take possession. But when we look at the case of *Graham* v. *Furber* (4), to which I refer in preference to other

(1) 2 Ex. 105.
(2) 5 E. & B. 830; 25 L. J. (Q.B.) 155.
(3) Law Rep. 3 C. P. 334.
(4) 14 C. B. 134; 23 L. J. (C.B.) 10, 51.

authorities, because the plaintiffs themselves appear to rely upon it, we find that the claimant there took possession of the goods without the intervention or privity of the bankrupt himself. The bankrupt was no party in any sense to what was done, and yet the transaction was held to be one *with him*. This case, therefore, seems to me (though it dealt in one respect with a different section (s. 125) of the Act) a clear authority that a transaction may be held to have been with the bankrupt, although he may not have been a party to every act by which it was carried out. But, again, it is said that the distinction is that these goods, not being merely in the order and disposition of the bankrupt, as in *Graham* v. *Furber* (1), but being his own goods, passed by the adjudication at once to the assignees, and became, as from the date of the act of bankruptcy, their property; and thus, therefore, when the defendants seized them they were not the bankrupt's property at all, and the "transaction" was, therefore, in this sense also not with him. But this is really a fallacious contention, and depends upon whether s. 133 of the 12 & 13 Vict. c. 106, applies or not. If it does, it cannot make any difference that the goods were the bankrupt's own before the act of bankruptcy. Indeed, this must be so in almost every case which occurs. For example, where he pays a favoured creditor with his own money, or passes property out of his possession by a regular conveyance. The goods and the money would be his, but he has none the less effectually parted with them. And although the property may not entirely be passed, a special property does pass. And just as a bailiff has a special property in goods he has taken possession of under a writ of execution, sufficient to enable him to maintain trespass and trover, so here, the defendants having taken possession under a valid agreement, have a special property in the goods sufficient to enable them to realize their security.

It seems to me, therefore, quite immaterial whether the goods were the bankrupt's own or merely in his "order and disposition," or whether he was actually a party to the seizure or not. I am of opinion the "transaction" was protected within the letter and spirit of the statute, and accordingly that judgment should be for the defendants.

(1) 14 C. B. 134; 23 L. J. (C.B.) 10, 51. 18 Jan 61.

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MARTIN, B. I also think the plea a good one. The fallacy of the argument for the plaintiffs consists in applying the word "transaction" only to the seizure of these goods, whereas in reality it consisted of the contract under which the goods were seized as well as of the seizure. The defendants rely on the contract by virtue of which the seizure was made, and allege that contract in terms, shewing it to be an irrevocable licence to take possession of the goods. I am clearly of opinion that, looked at as a whole, what was done was a "transaction" with the bankrupt, protected under the 133rd section of the statute.

CHANNELL, B. I am of the same opinion. There is no dispute that the title of the assignees relates back to the act of bankruptcy, and that would be a good reason for holding that the property in question vested in them, were it not for the provisions of 12 & 13 Vict. c. 106, s. 133. But if the case is within that section, the assignees cannot take this property; and the real and only question is, whether the facts alleged in the plea shew a "transaction" protected against the consequences of the bankruptcy. I am clearly of opinion that the "transaction" was protected. The cases of *Young* v. *Hope* (1), and *Hope* v. *Hayley* (2), are authorities for so holding. The whole matter, and not the mere act of seizure, must be looked at, and shew a taking possession of the goods under a licence that was not revocable. It seems to me a very clear case, and the defendants might, I think, have raised the defence under the plea of not possessed.

CLEASBY, B. I am of the same opinion. Section 133 of the Bankruptcy Act, 1849, uses the words "contract, dealing, and transaction." Of these words the first is technical, the second less technical, and the third appears to have been inserted to give as large an operation as possible to any arrangement made bonâ fide with the bankrupt. "Transaction" is a general word, and is thus defined in Webster's Dictionary: "Doing or performing; business: that which is done: an affair." But then the "transaction" is to be *with the bankrupt*, and here it was so, for the goods were seized by virtue of a contract with the bankrupt under which the pos-

(1) 2 Ex. 105. (2) 5 E. & B. 830; 25 L. J. (Q.B.) 155.

session of these goods was lawfully taken from him. The case is similar to that of the bankrupt's depositing goods for a loan. No property passes by the mere deposit, it is true, but by the deposit the "transaction" is complete so far as the bankrupt is concerned, and upon default being made, the lender of the money can realize his security.

The case of *Young* v. *Hope* (1) is an authority in support of this view. There Rolfe, B., says (2): "The expression in the statute is 'all contracts, dealings, and *transactions* by and with any bankrupt.' Here the 'transaction' is this, that before the committing of the act of bankruptcy certain goods are deposited with the bankrupt, upon terms enabling him to keep possession of them for a year upon payment of a certain sum, and enabling the owner to resume possession in case the money was not paid at the stipulated time. The owner takes possession after the act of bankruptcy, and before the issuing of the fiat. Such a case seems to me to come within the express terms of the Act of Parliament. Was it not a 'dealing,' was it not a 'transaction' with the bankrupt?" This observation equally applies, in my opinion, to the facts here, and the defendants are, therefore, in my opinion entitled to judgment.

Judgment for the defendants.

Attorney for plaintiffs: *Eley.*
Attorneys for defendants: *Davidson, Carr, & Bannister.*

(1) 2 Ex. 105. (2) 2 Ex. at p. 110.

1870
June 10.

ISAACS AND ANOTHER *v.* THE ROYAL INSURANCE COMPANY.

Fire Insurance—Time—Computation—"From"—"Until."

The plaintiffs insured their goods against fire with the defendants by a policy for six months, whereby it was provided that, from the 14th of February, 1868, until the 14th of August, 1868, and for so long after as the assured should pay the sum of 225 dollars, and the defendants, at the time above-mentioned, accept the same, the defendants' funds should be liable to make good losses by fire to the plaintiffs' goods. The plaintiffs intended to keep up this policy, and the defendants knew their intention, but the renewal premium was not demanded or paid on the 14th of August, 1868. On that day a fire took place which destroyed the plaintiffs' goods. The course of business between the plaintiffs and defendants was, that the defendants should come to the plaintiffs and demand the renewal premium:—

Held, that under the terms of the policy the whole of the 14th of August was protected; and that the defendants were, therefore, liable for loss caused by a fire happening on that day.

SPECIAL CASE.

The plaintiffs are merchants trading in London under the name of M. Isaacs & Sons, and at Callao and Lima, in Peru, under that of Rufus Davis & Co. The defendants are an insurance company in England, with branches at Callao and Lima. The plaintiffs insured their stock at Lima against fire with the defendants by a policy running from the 19th of April, 1864, to the 19th of October, 1864. This policy was renewed until the 19th of April, 1865, and then again until the 19th of April, 1866. Their Callao stock they insured from the 20th of May, 1867, until the 14th of August, 1867; and from the last-named day until the 14th of February, 1868. By means of these policies they were in the habit of keeping their stock at Lima and Callao fully and continuously insured. One of the plaintiffs being at Lima in January, 1868, asked the defendants' agent (Mr. Matthison) to keep up a continuous insurance on all the property of the firm there or at Callao, and Matthison told him he would attend to the request. The plaintiffs did not go to the defendants' office at Lima to procure the policies of insurance to be delivered to them, or to pay the premiums, but the Callao representative of Matthison came to the plaintiffs' store at Callao, and there delivered the policies and

received the premiums, and he always came for that purpose a few days after the dates of the policies respectively.

Upon the 17th of February, 1868, the policy now sued on was delivered to the plaintiffs. It was duly executed and issued by the defendants' agent, and, so far as is material, was in the following form:—

"The Royal Insurance Company.

"Lima. Six months. Annual.

"Sum insured, 30,000 dollars.

"Premium to the 14th of August, 1868, at $\frac{3}{4}$ per cent. = 225 dollars.

"Annual premium payable on the 14th of February, 1868.

"Whereas, Messrs. Rufus Davis & Co., merchants, Callao, have paid the sum of 225 dollars to John Matthison, Lima, as authorized agent of the Royal Insurance Company, and have agreed to pay the sum of 225 dollars for assuring from loss or damage by fire the property hereinafter described. [Here follows description.] . . .

"Now, be it known, that from the 14th day of February, 1868, until the 14th day of August, 1868, and for so long after as the said assured shall pay the sum of 225 dollars at the time above-mentioned, and the directors, by their authorized agent, shall accept the same, the funds and property of the said company shall be liable to pay and make good to the assured, their executors, &c., all such loss or damage by fire as shall happen to the property above-mentioned, subject to the conditions hereon indorsed.

"Dated the 14th of February, 1868."

Among the indorsed conditions was the following:—

"No insurance proposed to this company is to be considered in force until the premiums and duty be actually paid, and persons desirous of continuing annual insurances must make their respective payments of the premium and duty thereon on or before the commencement of each succeeding year."

The premium of 225 dollars was duly paid; and in the month of February, 1868, after the policy was issued, the plaintiffs told the defendants' Callao agent, as the fact was, that they intended to renew their policy. They received no intimation from him, or any one on behalf of the defendants, that the policy would not be renewed.

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Between 11 and 12 P.M. on the 14th of August, 1868, the plaintiffs' store at Callao and the property therein, being the property insured, were totally destroyed by fire. The plaintiffs applied to the defendants for payment of the value of that property, but the defendants declined to pay.

The question for the opinion of the Court is, whether the policy was still subsisting and in force when the fire and the consequent loss or damage to the plaintiffs occurred.

J. Brown, Q.C. (*Cohen* with him), for the plaintiffs. The policy covered the whole of the 14th of August. The general rule of computation, as now established, applies to it, according to which, where time is to be counted either from an act done, or a day certain, the initial day is excluded from, and the last day included in, the computation. Formerly a distinction existed where time was to be counted from the "date," or the "day of the date," of a particular act or instrument. But that distinction is exploded: *Pugh* v. *Duke of Leeds* (1); and the true question in each case is, what the intention of the parties, as expressed on the document to be construed, really was. Now, policies of insurance are to be construed in favour of the assured; and if it were necessary, it might be argued that here both the 14th of February and the 14th of August were covered; but it is sufficient to shew that both parties intended, and have expressed their intention, to exclude the first day, and include the last.

[MARTIN, B. That is the real question. I do not think both days were protected by this time policy. If the 14th of February was included, the 14th of August was not. Otherwise the period of more than six months would be covered by the policy.]

The provisions as to payment of renewal premiums prove that the intention was to include the last day. The insurance was to last until the 14th of August, or for so long after as the premium should be paid. The parties could not have intended to leave the 14th uncovered, unless the renewal premium was paid on that day. [He cited Chitty's Statutes, 3rd ed. vol. iv. p. 667; *Webb* v. *Fairmaner* (2); *Lester* v. *Garland* (3); *Ackland* v. *Lutley* (4); *Robinson*

(1) 2 Cowp. 714.
(2) 3 M. & W. 473.
(3) 15 Ves. 248.
(4) 9 Ad. & E. 879.

v. *Waddington* (1); *Williams* v. *Nash* (2); *Bellhouse* v. *Mellor* (3); *Reg.* v. *St. Mary, Warwick.* (4)]

Manisty, Q.C. (*R. G. Williams* with him), for the defendants, contended that the policy covered the 14th of February. Suppose a fire had happened on that day after the premium had been paid, the defendants would have been liable. The risk really commenced at midnight between the 13th and 14th of February; and as there is no sufficient authority for including both days, the 14th of August was excluded: *Wilkinson* v. *Gaston* (5); Chitty on Contracts, 8th ed. pp. 77, 78. It might be said that this construction makes a break on each day that the renewal premium was payable. But that would not be so if the premium were punctually paid. If, for example, in the present case, the premium had been paid on the 14th of August, as it should have been, the whole of that day would have been covered.

KELLY, C.B. I am of opinion that the plaintiffs are entitled to our judgment. The action is on a time policy of insurance for six months, "from the 14th day of February, 1868, until the 14th day of August, and for so long after as the said assured shall pay the sum of 225 dollars" by way of premium; and the question we have to determine is, whether the policy covers a fire which occurred on the 14th of August. That is all we have to determine, and not whether the 14th of February is *ex*cluded, so that no insurance was in force on that day, but whether the 14th of August was *in*cluded; and I think it was included.

Now, upon looking at the authorities before *Pugh* v. *Duke of Leeds* (6) was decided, it appears that questions without number arose as to whether, upon a contract to do any act, or enter into an engagement at or for a definite time, say six or twelve months from the day of the date of some act done, time was to be reckoned exclusive or inclusive of the last day of the time, but, in that case, it was observed that it was impossible to lay down any fixed rule, but that each case must depend on its own circumstances and subject matter. Sometimes the first day, and sometimes the last was

(1) 13 Q. B. 753.
(2) 28 L. J. (Ch.) 886.
(3) 4 H. & N. 116; 28 L. J. (Ex.) 141.
(4) 1 E. & B. 816.
(5) 9 Q. B. 137.
(6) 2 Cowp. 714.

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included. No settled and invariable rule has been laid down for all cases; but in those cited by the plaintiffs, and which were all more or less analogous to the present case, it appears that the last day of the time was included. Thus, in *Ackland* v. *Lutley* (1), we have the case of a lease granted for twenty-one years from the 25th of March in a particular year. That lease was held to last until the end of the 25th of March of the last year of the lease. Again, there is the case where a bankrupt was to be protected from the 16th *until* the 29th of July: *Bellhouse* v. *Mellor*. (2) There was no question there of including or excluding the day, but simply what was the meaning of "until," and the Court held that the whole of the 29th of July was included. Apply that decision to a case where an insurance is to be until a particular day, as here, "until the 14th of August," and I think the same result should follow. So again, in *Webb* v. *Fairmaner* (3), where goods were sold to be paid for "in two months' time," it was held that the last day was included, and the first, the day of the sale, excluded: And, in *Watson* v. *Pears* (4), where a patent contained a proviso that the specification was to be filed within one month's time next after the date thereof, the day on which the letters patent were granted was held to be excluded. Again, in the case where a security not to do a particular thing was to be given within six months from a testator's death, the last day of the six months was held to be included, and the obligor to have the whole of it to complete his obligation: *Lester* v. *Garland*. (5) So, once more to revert to *Pugh* v. *Duke of Leeds* (6), there was a lease granted, which was held to operate for the period mentioned, exclusive of the day of the grant. All these authorities illustrate the principle that, in general, the day on which the engagement is entered into is excluded, and the last day of the term is included. In this instrument, therefore, I have no doubt that the insurance covered the whole of the 14th of August; and I the more readily come to this conclusion, because though in this particular case a new policy was issued on the 14th of February, the practice of the office seems to have been, at the conclusion of a period of insurance, not to issue a new policy, but to continue the

(1) 9 Ad. & E. 879.
(2) 4 H. & N. 116; 28 L. J. (Ex.) 141.
(3) 3 M. & W. 473.
(4) 2 Camp. 294.
(5) 15 Ves. 248.
(6) 2 Cowp. 714.

old one by payment of the annual premium. Now, according to the defendants' contention, the assured would each year be left uninsured on the day of payment of the renewal premium. But the practice I have referred to, and the nature of the contract, shews the intention of the parties to have been to cover the last day. This conclusion, moreover, is consistent with justice, for the assured here had not to go and pay his premium to the company at any particular place, but there was a clear understanding that an officer of the company should come to him.

On these grounds I think the plaintiffs are entitled to our judgment. I do not deal with the question whether the first day is excluded. That question is not raised here, and I give no opinion upon it.

MARTIN, B. I am of the same opinion. The real question we have to decide is the meaning in this policy of the word "until." No doubt the expression is equivocal, but there are many cases in which, where the limit is from one day to another, the last day is included. For example, there is the case of the eight days allowed for pleading. So, where a man insures his premises from the 1st of January in one year to the 1st of January in the next, I think that the last day would be covered by the policy, and if on that day a renewal premium was paid, there would be no break in the protection given to his goods. But it is said this may be true; still the renewal premium must be paid on the last day—paid, that is, in this case, on the 14th of August. I do not assent to this argument, which seems to me overstrained. I think, therefore, that the whole of the 14th of August was covered by this policy, though at first I was inclined to entertain a different view of the matter.

CLEASBY, B. I am of the same opinion. In construing this policy, we must look at the operative words, and not at the heading of the policy, where the words "six months" occur. These words are only used at the beginning, and are not a safe guide to us. The important point to be considered is the meaning of the word "until" in the body of the policy. Now this insurance was effected in the first instance only until the 14th of August, 1869.

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But in construing the language employed we may take into account that the policy might have been renewed by the assured by paying a renewal premium on the 14th of August; and it certainly was the intention of both parties that it should be renewed. We are entitled to place some reliance on this fact, in order to interpret words which, taken by themselves, are somewhat equivocal. The renewal is to apply to some period after the 14th of August, and the policy itself, I think we may infer, covered that day. Taking, then, the context as our key, I think the proper conclusion is, that "until" the 14th of August means up to and including that day.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *E. T. Sydney & Son.*
Attorney for defendants: *Stevenson.*

1870
June 11.

SMITH *v.* THE ACCIDENT INSURANCE COMPANY.

Life Insurance—Insurance against Accident—Construction of Policy—Secondary Cause—Disease "arising within the System."

64 BD 44
76 BD 118

A policy of insurance against death from accidental injury contained the following condition: "This policy insures against all forms of cuts, &c., when accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure against death arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death directly or jointly with such accidental injury)."

The assured on Saturday, the 24th of April, accidentally cut his foot against the broken side of an earthenware pan. On the Thursday following erysipelas supervened, and of that disease he died on the next Saturday. The erysipelas was caused by the wound, and but for the wound he would not have suffered from it. In an action by his executrix against the insurers to recover the amount insured:—

Held (by Martin, Channell, and Cleasby, BB., Kelly, C.B., dissenting), that the insurers were protected by the above condition, and were not liable.

Fitton v. *Accidental Death Insurance Co.* (17 C. B. (N. S.) 122; 34 L. J. (C.P.) 28) discussed.

SPECIAL CASE. George Smith, in July, 1864, effected an insurance for 1000*l.* upon his life with the defendants, an insurance

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company, and a duly executed policy was issued to him whereby the defendants bound themselves to pay to his personal representative the sum insured in case he should be injured by accidental violence, and should within three calendar months of its occurrence die "from the direct effect" of the accident. It was provided that the policy and insurance thereby effected should be subject to the conditions thereupon endorsed, so far as the same should be applicable in the same manner as if they were repeated and incorporated in the policy. Among these conditions was the following:—"This policy insures against all forms of cuts, stabs, tears, bruises, concussions, crushings, . . . when accidentally occurring from material or external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations, but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death or disability directly or jointly with such accidental injury.)" George Smith regularly paid the premiums on the policy, and at the time of his death under the circumstances about to be stated it was in force.

On Saturday, the 24th of April, 1869, he was washing his feet in an earthenware pan, and whilst he was resting them on the edge of it, a piece of the side of it was suddenly forced in. One of his feet slipped and struck against the broken side. An incised wound was thereby inflicted on the foot under the ankle. He was at the time of the accident and had been previously a sober and healthy man. He was not then suffering from erysipelas either externally or internally, nor had he ever suffered from that disease at any period of his life. His avocation, however, that of a manager of a clothier's establishment, confined him to the house a great deal, and a person so employed would be more predisposed to an inflammatory disorder like erysipelas than a person leading a more wholesome life. The wound in Smith's foot was carefully and properly attended to, but on the Thursday following erysipelas set in. It was discovered between the ankle and the knee, about five or six inches from the wound. On the Saturday following he died. The erysipelas was

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the cause of his death. It was consequent upon the wound, and but for the wound he would not have had it. The plaintiff, as his executrix, now sought to recover from the defendants the amount insured; and the question for the opinion of the Court, who were to draw inferences of fact, was, whether the death of George Smith was or was not a death covered by the policy.

J. Brown, Q.C. (*Cohen* with him), for the plaintiff. The erysipelas arising from the cut or wound was the direct and sole cause of death, and the policy attaches just as it would have done if, instead of dying of erysipelas, Smith had died of hæmorrhage. Erysipelas is a disease which may either be caused by external violence, or may be developed internally, and it is only against the latter form of it, which may be termed "constitutional erysipelas" that the exception in the condition protects the defendants. *Fitton* v. *The Accidental Death Insurance Co.* (1), is an authority for the plaintiff. There the expressly excepted disorders in a similar policy issued by the same company were identical with those excepted here, yet the defendants were held liable for a death caused by hernia consequent on an injury. The condition in that case did not, it is true, contain the expression "secondary cause or causes," but these words do not enlarge the area of the defendants' immunity. They are merely general words—words descriptive of the same sort of disease as those enumerated, and the exception is only applicable when either those actually excepted, or others resembling them in character, arise within the system. If the exception was held to be universal, the policy would be almost nugatory.

Mellish, Q.C. (*T. Atkinson* with him), for the defendants. The case finds that the insured was from the nature of his avocation predisposed to erysipelas. That disease, although the direct consequence of the injury, in the sense that except for the injury the deceased would not have had it, might not have followed had his employment been a more healthy one. It was the probable, but not the necessary, result of the wound; and, arising within the system after the injury, and causing death jointly with it, is within

(1) 17 C. B. (N. S.) 122; 34 L. J. (C.P.) 28.

the very words of the exception. The case of *Fitton* v. *The Accidental Death Insurance Co.* (1) is distinguishable. There the hernia was the instantaneous consequence of the accident: it was, in fact, a part of the accident. Moreover, the condition now to be construed is stronger for the defendants. The exception covers all "secondary causes" of death arising within the system, and here the erysipelas was such a secondary cause.

J. Brown, Q.C., in reply.

CLEASBY, B. As there is a difference of opinion among the members of the Court, I have to deliver my judgment first. The question in this case turns entirely on the construction of the first condition indorsed on the policy of insurance, and on its application to the facts as found by the arbitrator, which are short and simple. On the 24th of April the assured received an incised wound in his foot. On the Thursday following, the 29th, erysipelas set in, or rather supervened, for the arbitrator finds that it was caused by the accident, and on Saturday, the 1st of May, the assured died. His disease was erysipelas; and that erysipelas was due to the wound. Under these circumstances we have to consider the contract between the assured and the defendants, and especially the effect of the condition indorsed on the policy. Of the general object of the condition there can be, I think, but little doubt. When an accident happens to any one, causing bodily injury, a variety of diseases may supervene, as to which it may be difficult to say whether death is caused by the disease or by the injury sustained. To prevent the necessity of inquiry this stipulation has been inserted to protect the company from liability in the case of certain supervening disorders. The policy first provides for the accidents it is to cover—and these it enumerates—and then follows the proviso that the company do not insure against death from "Rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time or following such accidental injury, whether causing such death directly or jointly with such accidental injury." Now, these words are somewhat difficult to construe properly, but the true construction seems to me to carry into effect what I conceive

(1) 17 C. B. (N. S.) 122; 34 L. J. (C.P.) 28.

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to be the object of the condition. Take the case of gout. That is a disorder connected with the constitution. It might in any case be caused or not by an accident, but very often it would be very difficult to say whether it was or was not so caused; and I think this proviso was intended to meet this difficulty. The same remark applies to erysipelas and to hernia also, for that, too, is, or may be, to a certain extent, constitutional. All these cases are provided for, and when they or any of them, as secondary causes, occasion death, the policy is not applicable. It is unnecessary to deal with cases where death has been caused by diseases not enumerated among the secondary causes, such as paralysis resulting from the accident. I found my decision on the disease of erysipelas being excepted in express words, and on its being in this case a secondary cause of death. With regard to the case cited, it presents no difficulty to my mind. The condition there did not contain any reference to "secondary" causes; and, moreover, the hernia which occasioned the death of the assured was instantaneously caused by the injury. It was, in fact, the immediate result of the injury sustained.

CHANNELL, B. I am of the same opinion. I think the words in the condition exempt the company from liability where death is caused by erysipelas supervening on an accident, and I come to this conclusion after considering the language of the first part of the condition, which enumerates the cases for which they are to be liable, and which throws light on the meaning of the subsequent part. It indeed appears to me that the present is just one of the cases that the company meant to exclude, where it is difficult to say whether the disease alone, or the disease jointly with the injury, was the cause of death. The condition seems framed to preclude the necessity of inquiry into the matter. The case cited from the Court of Common Pleas is distinguishable. The condition was not in the same language there as here, the clause as to "secondary" causes having since been inserted in this company's policies. Nor is hernia, caused as it was there, and being in fact a part of the injury itself, to be regarded in the same light as the erysipelas which supervened in this case. The plea, on demurrer to which the question arose, alleged facts shewing that the hernia was, in fact, part and parcel of the accident, the assured dying on the

spot just as though he had died from hæmorrhage. Upon the whole, therefore, I think that on the circumstances stated in this special case, our judgment should be for the defendants.

MARTIN, B. I am of the same opinion. I see no ambiguity in the expressions used in this policy, and, therefore, I by no means dissent, in arriving at the conclusion that the defendants are exempt from liability, from the observations made by Willes, J., in *Fitton's Case.* (1) I quite agree that, where there is ambiguity, it is important with reference to insurances that there should be a tendency rather to hold for the assured than for the company. At the same time I do not myself think it expedient to apply different rules of construction to contracts of insurance from those applicable to other written contracts. Now, I think that under the terms of this condition when fairly interpreted, the company are exempt by express words from liability where the death of the assured was caused as it was here. No violent inference from the words used need be drawn; the express words of the policy are to my mind sufficiently clear. First there comes a recital of a proposal to insure against accidents generally, and then there is endorsed on the policy the condition in question, upon and subject to which the policy is expressed to be effected, and which by a proviso is declared to be applicable in the same manner as if it was incorporated in the policy itself. It commences with a statement of the perils which the company does insure against, namely, against "all forms of cuts, stabs, &c., when accidentally occurring from material and external cause, operating on the person of the insured where such accidental injury is the *direct and sole cause* of death." These words, even if they had stood alone, appear to me to indicate very clearly the sort of accident for which the company undertake to be responsible. But the words which follow place the matter, in my judgment, beyond a doubt. The defendants do not insure "against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time or following such accidental injury (whether causing such death or disability directly or jointly with such accidental injury)."

(1) 17 C. B. (N. S.) at pp. 134, 135; 34 L. J. (C.P.) at p. 30.

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Thus, in distinct terms, the defendants guard themselves from liability where the death occurs from erysipelas, whether causing death directly or jointly with the injury, and the subsequent words about secondary causes arising within the system do not cut down the significance of the preceding words, but, on the contrary, were I think, intended to include other causes of death besides those actually enumerated, and thus enlarge instead of diminishing the defendants' immunity. With regard to the case of *Fitton* v. *The Accidental Death Insurance Co.* (1), I believe it to have been rightly decided and to be quite consistent with the conclusion to which I have come in the present case. The words used in the plea demurred to, which set forth the facts as to the death of the assured, shew that the instant and direct effects of his accidentally falling on the floor of a room were a rupture and strangulated hernia. The hernia there, was, it may be said, a part of the accident, and a death so caused seems to me as much within the policy as if it had been directly caused by bleeding from a cut. It was not such a hernia as the condition contemplates, being in no sense a secondary cause of death consequent on the injury received, but part and parcel of the injury itself.

KELLY, C.B. This is unquestionably a doubtful and difficult case, and, after listening to the opinions of my learned Brethren, I cannot, but in some measure, mistrust my own judgment; but I am of opinion that the plaintiff is entitled to recover. The facts, as found by the arbitrator, are clear. The deceased, who was insured by the defendants against accidents generally, whilst washing his feet in an earthenware bath sustained an injury by cutting one of them near the ankle on the ragged edge of the bath. For that wound a surgeon attended him, and he was taken to a hospital. Five days after the accident erysipelas supervened, and in two days more he died from that disease. It is expressly found that the erysipelas, which was the immediate cause of death, resulted from the wound, and that unless he had been wounded he would not have had erysipelas. The question is whether this death, thus occasioned, is within the meaning of the defendants' policy.

Now, I entirely agree with the observations of Willes, J., in

(1) 17 C. B. (N. S.) 122; 34 L. J. (C.P.) 28.

Fitton's Case (1), that it is extremely important with reference to insurances that there should be a tendency rather to hold for the assured than for the company where any ambiguity arises on the face of the policy; and I will add that it appears to me to be equally important that where an insurance company think fit to introduce an exception to a liability which they have contracted to bear, they should express that exception in clear and unambiguous terms. But when I read this condition, I cannot, especially having regard to the principles of construction laid down, and the decision arrived at in *Fitton's Case* (1), see that the exception as to erysipelas is so worded as to protect the defendants here. The Court of Common Pleas in the case referred to put a judicial construction on this very clause, save that the words "secondary cause" have been introduced since their decision. There, Williams, J., in his judgment, says (2): "Looking at the language of the policy, and taking the first condition altogether, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system;" and I am of opinion, in conformity with the opinion there delivered by Williams, J., that it is the effect of the condition to exempt the company from liability only in respect of death from erysipelas, where the erysipelas arises within the system, and is collateral to the accident.

But let us proceed to look a little more closely at the words of the condition. After stating the accidents or causes of death that are insured against, it goes on to specify those causes which are not, including "rheumatism, gout, hernia, erysipelas," and then come the words which have been so fully discussed—"or other disease or secondary cause or causes arising within the system of the assured before or at the time or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury." Now, according to the view taken by the rest of the Court, erysipelas is for all purposes expressly excepted from the series of events which create a liability in the defendants. But if this be the true view, why not have stopped at the word "erysipelas" and have added "however caused, whether by an

(1) 17 C. B. (N. S.) at pp. 134, 135; 34 L. J. (C.P.) at p. 30.

(2) 17 C. B. (N. S.) at p. 134; 34 L. J. (C.P.) at p. 30.

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accident or otherwise?" Moreover, it should be remarked that this unqualified and unlimited construction is inconsistent with the decision in *Fitton's Case* (1), where the death of the insured was from hernia caused by the accident. It is clear to me, therefore, that we must construe these words with reference to those which follow, and place some limitation upon them.

To revert once more to the language actually used, let us contrast for a moment what the defendants have said with what they might have said. Instead of excepting rheumatism, hernia, &c., whether causing death "directly or jointly," with the injury, they might have excepted them in unambiguous terms, "whether produced by the accident or otherwise;" and in the same manner they might have gone through a whole catalogue of consequences likely to supervene on a cut or a bruise, such, for instance, as mortification or hæmorrhage, and by excepting them expressly, have really rendered the policy almost nugatory. Indeed, they might effect this purpose under the present words, if my learned Brethren are right, by merely increasing the diseases specified by name. But could it be contended that by an express mention, say of hæmorrhage or mortification, the defendants could exonerate themselves where death had ensued from mortification or hæmorrhage supervening on a cut. The death would still be from the cut, and the policy, in my judgment, would be available, for the general effect and true construction of such a document seems to me to be that it covers not only the actual injury itself, but any disease like lockjaw, mortification, or erysipelas, which is caused by and may be regarded as the natural and probable consequence of the injury.

It remains to be considered whether the words of the condition which have been introduced since the decision in *Fitton's Case* (1), make any difference in the extent of the defendants' liability. Without these words I think that decision is a clear authority for the plaintiff here. But it is by them provided that the policy does not insure against death from the enumerated disorders, or "any other disease or secondary cause arising within the system of the insured." Now I pause upon the word "secondary," because it certainly does introduce doubt as to the true construction of the

(1) 17 C. B. (N. S.) 122; 34 L. J. (C.P.) 28.

sentence. If it means that whenever the hernia or erysipelas, causing death, is the secondary consequence of the accident, the defendants are not to be liable, then the present case would be within the exception. But I do not think it can be taken in this unqualified sense. It appears to me to be no more than a general word, descriptive of the character of the previously enumerated maladies, and that it must be read with reference to the words immediately following. The whole sentence thus read bears to my mind a plain and intelligible, and but for the opinion of my learned Brethren, I should have said an obvious meaning. It enumerates a certain class of maladies which are of a secondary character, and which may all of them arise within the system and continue collaterally to and parallel with the injury sustained, and it provides that where death is caused by any of these secondary diseases *arising within the system*, there the policy shall not attach, even though the disease, unless aggravated by or conjointly with the injury, would not have been fatal. I do not see how it is possible to reject these words " arising within the system," from our consideration, and I find no words in the condition capable of being construed to except the secondary disease of erysipelas altogether, in such a case as this, where it did not " arise " at all within the system,—where (as the arbitrator finds) it never would have arisen but for the accident, and where it was the direct consequence of that accident. My conclusion as to this contruction of the condition is strengthened by the remaining words of the condition. The company are not to be liable for a secondary cause arising within the system " before or at the time of, or following, such accidental injury, whether causing such death directly or jointly with such accidental injury." The very use of this word " before," is an additional reason for construing the whole condition as I do. It shews that the real intention was to provide against secondary diseases arising within the system, and which might and probably would, therefore, be before the accident, in point of time, and wholly independent of and collateral to it, and not against those which, like the erysipelas here, were the direct consequence of the accident, and but for that would never have existed at all. And the last material words of the condition, " whether causing such death directly or jointly with such injury," also seem to me applicable to a class of diseases

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causing death either directly or jointly with the injury, but being in their nature wholly collateral to it.

Taking then the condition as a whole, I am of opinion that it points to a particular class of diseases which arise within the system, either before, at, or after the injury, and exempts the defendants from liability when death is caused by any of them, either directly or jointly with the injury, but that it does not apply to any of these diseases when they supervene on the injury, are caused solely by it, and are its natural consequence. In my judgment, this construction is the one which is the more reasonable and natural of the two contended for; but even if I were in doubt, I should still think that the ambiguity of the language used is such as to warrant me in acting on the well-known principle of construction applicable to policies of insurance, and in giving the benefit of that ambiguity to the assured. As, however, my learned Brethren are of a contrary opinion, the judgment of the Court must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *E. J. Sydney & Son.*
Attorneys for defendants: *Digby, Sharpe, & Large.*

July 7.

MAILLARD *v.* PAGE.

Bill of Exchange—Agreement to Renew—Time to apply for Renewal.

The defendant accepted the plaintiff's draft at six months, and the plaintiff agreed in writing to renew the bill, if circumstances should prevent the defendant from meeting it at maturity. The defendant made no application for renewal during the currency of the bill; but on the plaintiff's presenting it for payment shortly after it became due, he claimed to have it renewed according to the agreement, circumstances having in fact prevented him from meeting it. In an action on the bill:—

Held (Cleasby, B., dissenting), that the defendant was not bound to apply for a renewal during the currency of the bill; but that it was sufficient if he did so within a reasonable time after it became due.

ACTION, by drawer against acceptor, on a six months' bill for 5000*l.*, dated the 12th of August, 1869.

Plea, on equitable grounds: That when the defendant accepted

the bill, the plaintiff gave the defendant a written undertaking that, if any circumstances should prevent him from meeting the bill, the plaintiff would renew it; that the defendant accepted the bill on the faith of such promise; that he was prevented from meeting the bill by circumstances not avoidable by him; and that he "thereupon [and within a reasonable time in that behalf after the said bill became due (1)] applied to the plaintiff, and requested him to renew the bill according to his promise," and, at the same time, undertook to accept, and would have accepted, the bill when so renewed by the plaintiff; but that the plaintiff refused.

Issue.

At the trial of the cause before Pigott, B., at the sittings at Westminster in Trinity Term, 1870, it appeared that the bill sued on was given in respect of part of the price for which, under an arrangement between the plaintiff and the defendant, the lease of the Colosseum, in Regent's Park, was to be sold by the plaintiff to the defendant, as a preliminary for starting a theatrical joint-stock company. The agreement stated in the plea was contained in the following letter from the plaintiff to the defendant.

"12th August 1869.

"DEAR SIR,—As I am confident that you will exercise talent and influence to make the Colosseum property a great success, I accept the first payment of 5000*l.* in your promissory note (2) of this date, for six months, and, should any circumstances prevent your meeting it at the time, then I will renew it.

"I also engage out of the agreed price (60,500*l.*), to be paid to me in cash, shares, and mortgage, as per agreement, to pay you 7500*l.* in cash, and 5000*l.* in shares of the company now forming, and this day to pay Dr. Davis the sum of 500*l.* added to the 60,000*l.* as commission for immediate purposes.

"Yours truly,

"PARNELL ROBT. MAILLARD."

The project of starting the company fell through, and the defendant was unable to meet the bill. No application for its renewal was made until after its maturity; but on a demand of payment made by the plaintiff's attorneys two days after that

(1) The words within brackets were added during the argument. See post, p. 315.

(2) It was, in fact, a bill.

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time, the defendant in an informal manner claimed the benefit of the agreement, and offered to renew the bill, an offer which was afterwards formally made by his attorneys on the 3rd of March, 1870. On both occasions, however, this offer was rejected by the plaintiff.

The jury found that circumstances did prevent the defendant from meeting the bill; and a verdict was entered for the defendant, with leave to the plaintiff to move to enter it for him, the Court to have power to draw inferences. A rule having been obtained accordingly, or to enter judgment for the plaintiff non obstante veredicto.

June. 4. *Prentice, Q.C.*, and *Aston*, shewed cause. The contemporaneous written agreement binds the plaintiff to renew on the event which has occurred; an event which was in fact due to the very cause contemplated by the parties, the failure to start the projected company. Such an agreement is a good defence at law; in *Gibbon* v. *Scott* (1), the defence failed because no application to renew had been made. According to the marginal note, it appears that the ground relied upon by the defendant was that notwithstanding no application to renew had been made, the plaintiff could not sue till the expiration of the time for which the bill was to be renewed, and it seems to have been assumed that an application to renew after the dishonour of the original bill and before action brought, would have been in time.

[CLEASBY, B. There was nothing to prevent the plaintiff from negotiating the bill, and he appears to have done so in fact (2); was he not entitled to notice so that he might have an opportunity of providing funds to take it up?

PIGOTT, B. Would the defendant have been entitled to apply for renewal at any time before maturity? Till then it could not be ascertained that he would be prevented by circumstances from meeting it.

CHANNELL, B. The plea as it stands is not proved. The word "thereupon" must be altered or qualified.

(1) 2 Stark. 286.

(2) This was not proved at the trial, but it was conceded on the argument to be the fact.

The plea was then amended by the addition of the words within brackets ; see p. 313.]

Young v. *Austen* (1), *Brown* v. *Langley* (2), and *Wood* v. *Dwarris* (3), were also cited.

Quain, Q.C., and *C. B. Russell*, in support of the rule. *Gibbon* v. *Scott* (4), is an authority for the plaintiff; the inference drawn from the marginal note is not supported by the report. The form of the bill shews it was intended to be negotiable; and the difficulty suggested by Cleasby, B., shews that the last moment at which an application could be made was the last moment before maturity. On its dishonour, a cause of action at once arose which could not afterwards be displaced: *Siggers* v. *Lewis* (5).

Cur. adv. vult.

July 7. The following judgments were delivered.

CLEASBY, B. I cannot myself see that there is any defence to this action.

If there was a contemporaneous agreement of such a nature as to prevent the bill, properly speaking, from being a bill of exchange at all, there would be a clear defence. But in the present case, it is a bill of exchange, given in lieu of cash, and is only to be renewed in a particular event, within the knowledge of the defendant, viz., of circumstances preventing him from meeting it. The bill was produced, and was accepted payable at a banker's in the usual way, and had been negotiated by the plaintiff, and was returned to him when dishonoured.

We have to consider, therefore, what is the effect of a written agreement to renew in a particular event, which is of such a nature as makes it the duty of the acceptor to apply for a renewal.

It is indisputable, in the first place, that the holder at the time when it became due, could have maintained an action against the defendant. Supposing he had done so, would the defendant have had any remedy over against the plaintiff? I think not. If the defendant had taken the proper steps before the bill was presented to have it renewed by the plaintiff, it would then have been the duty of the plaintiff (by virtue of the agreement to renew) to

(1) Law Rep. 4 C. P. 553.
(2) 4 M. & G. 466.
(3) 11 Ex. 493 ; 25 L. J. (Ex.) 129.
(4) 2 Stark. 286.
(5) 1 C. M. & R. 370.

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provide for the bill himself, or he would have been liable to an action. But as no steps whatever were taken, and the plaintiff was not in any manner in default, it was the duty of the defendant himself to provide for the bill. He might never have applied for a renewal, and how could he by applying for a renewal afterwards give himself a cause of action? The fact of the plaintiff having negotiated the bill can make no difference, as it appears to me. It is not suggested that the plaintiff in negotiating the bill was guilty of any breach of engagement. Being given in the place of cash, it was plainly intended for negotiation, and the defendant was not prejudiced, if he had taken the proper steps.

It is clear that when a bill is given subject to an engagement to renew at the option of the defendant, the bill, until that option is exercised, is the contract between the parties, and the proper form of declaring is upon the bill, as was done in *Gibbon* v. *Scott* (1) and all the other cases. If the agreement to renew made it a different contract, it would be necessary to declare upon the altered contract. There was, therefore, in the present case, as soon as the bill was returned dishonoured, a cause of action in the plaintiff upon the bill. He might have brought his action at once. I can see nothing like an answer to such a cause of action. It can hardly be suggested that the taking proceedings is itself a defeazance of the right so as to operate as a bar.

It was pressed in argument that the defendant must have till the last moment to pay, because he could not know till then whether circumstances would enable him to pay or not. I think a man must have sufficient knowledge of what his means of paying 5000*l.*, or indeed any sum, will be in a couple of days, to enable him to determine whether he will apply for a renewal or not. The plaintiff could not have said in answer to such an application, "Wait till the bill becomes due, and you may then be able to pay it;" it would have been the duty of the plaintiff in the case put to provide for the bill as before explained.

It is unnecessary to dwell upon the absence of evidence of any application to renew the bill until ten days after the defendant had given the name of his attorney to defend the action, when the writ must, I suppose, have been issued; because it appears to me

(1) 2 Stark. 286.

that, taking the plea as it originally stood or as amended, it is not proved by the evidence. The defendant did not apply for a renewal upon the bill becoming due (taking the plea as it originally stood), nor did he, in my opinion, apply within a reasonable time afterwards, because the application ought, according to my view, to have been made before.

CHANNELL, B., delivered the judgment of himself and PIGOTT, B., as follows :—

This was an action by the drawer of a bill of exchange against the acceptor, tried before my Brother Pigott at the sittings in last Trinity Term. The only plea was one pleaded as an equitable plea, that the bill had been accepted on the faith of a written undertaking by the plaintiff contemporaneous with the bill, to renew the bill "if any circumstances should prevent the defendant from meeting the bill." At the trial, the jury found that circumstances did prevent the defendant from meeting the bill, but it appeared that the defendant made no application for a renewal of the bill during the time of its currency. A verdict was entered for the defendant, but with leave to the plaintiff to move to enter it for him, and the Court was to have power to draw inferences, and to amend the pleadings, if necessary, to give effect to the finding of the jury and to certain letters put in as read. A rule to shew cause why the verdict for the defendant should not be set aside and a verdict be entered for the plaintiff, or why judgment should not be entered for the plaintiff non obstante veredicto, was obtained by the plaintiff. The questions on this rule were argued last term before my Brothers Pigott and Cleasby and myself.

On the part of the plaintiff it was contended that a promise to renew was not available as a defence, unless the acceptor elected during the currency of the bill to avail himself of the promise, and that if the bill was dishonoured, a cause of action was at once vested.

It was further contended that the plea was not proved, because it alleged that the defendant thereupon (that is, upon his being prevented meeting the bill) applied for a renewal, when in fact he did not definitely apply for a renewal till about ten days after maturity. He did, however, two days after the bill became due, in reply to an application for the payment made to him by the

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plaintiff's attorneys, allege (as the fact was) that the plaintiff had promised to renew. Taking all the circumstances into consideration, we think we ought to hold as a matter of fact, that the defendant did apply to renew within a reasonable time after the bill became due, though not "thereupon," as alleged in the plea. It is true that the defendant did not actually tender an acceptance on stamped paper, or anything of that kind, but after a time, at all events, he did apply for the renewal, and then the plaintiff clearly declined to renew. We think, therefore, that the plaintiff dispensed with the actual tender of an acceptance by the defendant, if that was necessary.

The defendant has asked us to amend the plea by alleging that he applied for the renewal within a reasonable time, instead of "thereupon." We ought not so to amend the plea unless we think, when so amended, the evidence would prove it in point of fact. Again, if we permit the plea to be so amended, then the objection taken by the plaintiff, that there was no application for a renewal during the currency of the bill will appear clearly upon the record, and if the amendment proposed would render the plea bad, we ought not to amend it. To do so would entitle the plaintiff to judgment non obstante veredicto. It becomes necessary, therefore, to consider the effect of this objection before we can decide to permit the amendment.

The case principally relied on by the plaintiff's counsel was *Gibbon* v. *Scott* (1). That was a case at nisi prius, and is so shortly reported that it is one point of difficulty to say what the real facts were. It seems, however, that no application for a renewal had been made at all, and all that Lord Ellenborough appears to have held is that, under those circumstances, it was not necessary for the plaintiff to wait for the whole period for which the bill in renewal was to be given, before he could sue on the one that had been dishonoured. If the marginal note (which is nearly, if not quite, as full as the report itself) is to be taken as accurate, it is clear that the time when Lord Ellenborough thought the application for renewal ought to have been made was "after the expiration" of the period of the original bill.

In Bayley on Bills, p. 498 (6th edition), it is said that, "where the

(1) 2 Stark. 286.

defence is an engagement to renew, it will be incumbent on the defendant to shew that he has taken the proper steps towards such renewal." For this *Gibbon* v. *Scott* (1) is quoted, and we think this accurately represents what is the true effect of that decision. The renewal being for the benefit of the defendant, it is for him to take the trouble of any necessary steps, and not for the plaintiff. Thus the defendant must provide the stamp, and so on. But neither the passage in Bayley, nor the case quoted, go the length of saying what the proper steps are that the defendant must take, nor when they are to be taken. Indeed it seems to us clear, that this must be in each case a question of construction of the contract under which the renewal is claimed. This is the case of a written contemporaneous agreement varying the effect of the bill as between the parties to the agreement. If the bill had been sued upon by an indorsee without notice of the agreement, it would not be contended that the agreement would afford a defence. If the agreement for a renewal had been contemporaneous, but not put into writing, it would not be admissible, and so could not be taken to be part of the contract between the parties. Here, however, the agreement is contemporaneous and in writing, and the bill is sued upon by the drawer himself. We understand that it was negotiated, though that does not appear to have been proved at the trial. We do not think, however, that it would make any difference if it had been proved. The bill seems to have got back to the hands of the plaintiff immediately upon its being dishonoured, if not before, as an application for payment of it was made by his attorneys the day after it became due; and he now sues upon it. We think his rights must be taken to be the same as if the bill had been in his hands throughout.

Now as between the original parties to a bill, it is clear that the effect of the bill can be controlled by a written contemporaneous agreement. If the agreement is merely collateral, it only affords ground for a cross action, and not for a defence to the bill; but there are many cases in which it has been held that the bill and the writing together form only one contract. *Bowerbank* v. *Monteiro* (2), is an instance of an agreement to renew. In *Leeds* v. *Lancashire* (3), it was held that a note and a memorandum

(1) 2 Stark. 286. (2) 4 Taunt. 844. (3) 2 Camp. 205.

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indorsed on it together formed one agreement, and required an agreement stamp. In *Young* v. *Austen* (1) a plea of a similar agreement was held good on demurrer. We think there is no ground for saying that the undertaking in the present case is merely collateral. The plea alleges that the defendant gave the acceptance on the faith of the undertaking in question, and the defendant at the trial swore that this was the fact.

The question therefore arises, what is the construction of the contract between these parties, taking it to consist of the bill and the written undertaking together. Is it, as the plaintiff must contend, that he was to have a cause of action if the bill was not paid at maturity, unless the defendant had previously to that time applied for a renewal? We do not think that can be the construction, because the condition upon which the defendant is to be entitled to a renewal, though certainly rather a vague one, is yet such, that it cannot be ascertained before the bill arrives at maturity, whether the defendant will be entitled to a renewal or not. The bill is to be renewed if any circumstance prevents the defendant paying. The circumstance need only happen the instant before the bill becomes due, or contemporaneously. If the defendant had proposed to pay the bill out of funds at his bankers, and they had stopped payment on the day when the bill should have been presented at the bank, the defendant having no funds elsewhere, this would clearly be "a circumstance preventing the defendant meeting the bill," and it would be impossible to say that the defendant would in that case have forfeited his right to a renewal by not applying for it previously. Again, if the defendant had, before the bill became due, proposed to have it renewed on the ground that he had no funds, the plaintiff might have declined on the ground that he had a right to take his chance of the defendant's obtaining funds before the time came. It cannot, therefore, in our opinion be that the defendant is bound before maturity to elect to have the bill renewed; and if that is so, it seems to us that he must have a reasonable time after he has been prevented meeting the bill, within which he may apply for the renewal.

It has been pressed upon us that, immediately upon the dishonour of the bill, a cause of action vested, and *Siggers* v. *Lewis* (2)

(1) Law Rep. 4 C. P. 553. (2) 1 C. M. & R. 370.

was quoted, where, in an action against the drawer of a bill, it was held that a plea was bad which alleged that the action had been brought before a reasonable time had elapsed for defendant to pay the bill after the notice of dishonour. This proceeded on the ground that the drawer's contract was a contract to pay on demand. We do not think however, that the defendant here did contract with the plaintiff to pay on demand at maturity. He only contracted to pay then, unless prevented by a circumstance within the meaning of the agreement. The jury have found that he was prevented by such a circumstance, and we think therefore that no cause of action vested in the plaintiff immediately upon the dishonour of the bill. We agree that the defendant, upon being so prevented, was bound to give notice that he required a renewal, and that if he had not done so at all the plaintiff would not have been bound to wait for the whole period of renewal before suing. At the same time, we think that, as the defendant did apply, though not during the currency of the bill, nor until application had been made to him, yet before the action was actually commenced, and within what we consider a reasonable time, he did what was required from him, and the plaintiff fails.

The point, however, cannot be considered free from doubt, and we do not think the Court would be justified in amending the defendant's plea so as to raise this objection on the record, except upon the distinct application of the defendant, and at his peril. Inasmuch, however, as the plea, when amended, will in our judgment be good in point of law, and as it will meet the facts proved at the trial, we think, considering the terms in which the leave was reserved, we ought to amend if the defendant desire it, which we understand to be the case. We think, therefore, that the plea should be amended as proposed, the verdict thereon should stand for the defendant, and the plaintiff's rule to enter the verdict for him, or for judgment non obstante veredicto should be discharged.

Rule discharged.

Attorneys for plaintiff: *Johnson & Masters.*

Attorney for defendant: *F. F. Jeyes.*

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Breach of Promise of Marriage—Breach of Contract by Refusal to perform, the time for performance not having arrived.

The defendant promised to marry the plaintiff so soon as his (the defendant's) father should die. During the father's lifetime, the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of the promise, the defendant's father being still alive:—

Held, (Martin B. dissenting) that the principle of *Hochster* v. *De la Tour* was not applicable to the case of a promise to marry, and that no breach had been committed.

Hochster v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) discussed.

ACTION for breach of promise of marriage. The first count of the declaration stated that the plaintiff and defendant agreed to marry one another *when and so soon as the father of the defendant should die;* that until the defendant wrongfully refused to perform and broke his agreement as thereinafter alleged, and absolved, exonerated, and discharged the plaintiff from the performance of her agreement, as thereinafter mentioned, the plaintiff always was sole, and unmarried, and ready and willing to perform the said agreement on her part, and to marry the defendant when and so soon as the father of the defendant should die, of all which the defendant had notice; yet the defendant, after the making of the agreement, and before the death of his father, wrongfully refused to fulfil his agreement, or to be any longer bound thereby, and wrongfully exonerated and discharged the plaintiff from her said agreement, and from the performance thereof on her part, and from being bound thereby, and wrongfully wholly broke, put an end to, and determined his said agreement. The second count alleged a simple promise to marry, that a reasonable time had elapsed, and that although the plaintiff was ready and willing the defendant refused to marry her.

The Pleas denied the promise and the breach alleged in the first count; and as to the second count, denied that a reasonable time had elapsed, and alleged exoneration and discharge by the plaintiff before breach.

The case was tried before Martin, B., at the Staffordshire Spring Assizes, 1870. It was proved that the plaintiff was in service in

the house of the defendant's father, and that the defendant promised to marry her upon the death of the father, from whom some opposition to the engagement was anticipated. The father was still living at the time of action brought; but the defendant had positively refused ever to perform his promise to the plaintiff.

It was contended at the trial that on this evidence the plaintiff must be nonsuited, the time for the performance of the promise not having arrived. That was the opinion of the learned judge, but upon the authority of *Hochster* v. *De la Tour* (1) he allowed the case to go to the jury, who found a verdict for the plaintiff upon the first count (damages 200*l.*) and for the defendant upon the second.

A rule was obtained to arrest the judgment, and for a new trial, on the ground of misdirection in the learned judge in refusing to nonsuit the plaintiff, and on the ground that the verdict on the first count was against evidence.

Hill, Q.C., and *Dodd* showed cause. The defendant having given a positive and unqualified refusal to perform his contract, the case is directly within the authority of *Hochster* v. *De la Tour* (1).

[KELLY, C.B. That case may be distinguished on the ground that there expense was incurred by the plaintiff before the date from which the performance of his duties was to commence.

CHANNELL, B. There also the dates were fixed and definite, but the promise in this case was to be performed only upon the defendant surviving his father, which was a mere indefinite contingency.]

Every contract involving personal performance must, if the performance is not to take place until a future day, be contingent on the contracting party living till that day; and in that sense the agreement in the case cited was equally contingent with the agreement here, being, in fact, personal upon both sides. It is impossible to deny that there was a breach of the contract, for unless it has been either rescinded or broken it still subsists entire for all purposes. It certainly has not been rescinded, for that requires the assent of both parties; and it certainly does not now subsist

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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entire, for then the defendant, when the condition for performance arrived, would be able to call upon the plaintiff to perform her promise, and would be entitled to sue her if she refused, which cannot be maintained. But if the contract no longer subsists for the purpose of being enforced by the defendant, it must be because he has exonerated the plaintiff from performance, as the declaration alleges; and that, since there has been no consent on her part, can only be by reason of his breach. Where the obligation of a contract is at an end, and there has been no rescission, how is it possible to avoid the conclusion that there has been a breach?

The principle of *Hochster* v. *De la Tour* (1), that an absolute refusal to perform, though made before the day, is a breach, and puts an end to the contract as far as concerns the right of the party refusing, was followed in *Danube and Black Sea Company* v. *Xenos*, (2) where the defendant expressly refused to be bound by a contract entered into by his agent with the plaintiffs; but afterwards, and before the day fixed by the contract, made a tender of performance, which the plaintiffs refused to accept; and, in cross actions, it was held that, the defendant having expressly renounced his contract, the plaintiffs were entitled to sue him for the breach constituted by that refusal to perform, and that he could not sue the plaintiffs for non-performance of their part of the contract: see per Erle, C.J. (3) In the case of *Avery* v. *Bowden* (4), the decision in *Hochster* v. *De la Tour* (1) was adhered to, but the case was distinguished in the Queen's Bench (5), on the ground that there had been no absolute and final refusal by the defendant before the declaration of war, or none which the plaintiff had chosen to treat as such; and in the Exchequer Chamber the same view was taken, both in that case, and in the similar case heard at the same time of *Reid* v. *Hoskins*. (6) The principle of these cases is adopted, and stated in express terms in many text books. Leake on Contr., p. 462; Addison on Contr., 6th ed. p. 974; Selwyn, N.P., 13th ed. p. 192, note (*d*); Bullen and Leake, 3rd ed.

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.
(2) 11 C. B. (N. S.) 152; 31 L. J. (C.P.) 84.
(3) 11 C. B. (N. S.) at p. 175; 31 L. J. (C.P.) at p. 91.
(4) 5 E. & B. 714; 25 L. J. (Q.B.) 49.
(5) 5 E. & B. at p. 728; 25 L. J. (Q.B.) at p. 55.
(6) 6 E. & B. 953; 26 L. J. (Q.B.) 3, 5.

p. 462 (n). It is also adopted in the American courts, following the same precedents; and was expressly laid down in *Crabtree* v. *Messersmith*, (1) where the plaintiff, having sold a threshing machine to the defendant upon the terms that it should do good work, and that the defendant should, in that event, pay for it either in money or corn before Christmas, 1861; and the defendant having wrongfully returned the machine to the plaintiff and left the State before Christmas, without paying or providing for payment; the plaintiff was held to have rightly commenced his action on the 23rd of December, 1861. (2) Here, upon the same principle, the defendant, having expressly renounced the contract, has committed a breach of it, for which the plaintiff is entitled to sue: *Short* v. *Stone*. (3) And as to the assessment of damages, the theoretical difficulty will be the less from the fact that in all such cases, a jury is entitled to use a large discretion (4); and the practical difficulty is not much greater than is usual.

Powell, *Q.C.*, and *Streeten*, in support of the rule. The cases relied upon for the plaintiff are all cases of mercantile contracts, in which some expense was to be incurred or something done by the plaintiff, before the day for the defendant's performance. But even as to such contracts *Phillpotts* v. *Evans* (5), (following *Startup* v. *Cortazzi* (6)), shews that a contract is not broken by a mere declaration by one party to it that he will not perform: (see per Parke, B. at p. 477). It was upon that principle that damages for breach of a contract to accept goods were there held to be properly assessed with reference to the time when performance became due; and damages were measured by the same rule in *Leigh* v. *Paterson*. (7) This was laid down still more explicitly in *Ripley* v. *McClure* (8), where it was held that a refusal to perform made before the time for performance arrived was not a breach, and that after refusing, the party under obligation might, at any time previous to the time for performance, retract his refusal; in that

(1) 19 Iowa R. 179.

(2) *Lamoreaux* v. *Rolfe*, 36 New Hamp. R. 33, was also referred to, but there the Court treated the refusal to perform as having taken place at the time fixed for the performance of the contract (see p. 37).

(3) 8 Q. B. 358.

(4) Sedgwick on Damages, 4th ed. 426, (369).

(5) 5 M. & W. 475.

(6) 2 C. M. & R. 165.

(7) 2 J. B. Moore, 588; 8 Taunt. 540.

(8) 4 Ex. 345.

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case, however, the refusal remained unretracted. Assuming, therefore, the existence of such a contract as is stated in the first count, it is clear, also, that there was no evidence of a breach in fact, and there is therefore nothing to amend the count by. An unconditional promise to marry is necessarily broken by marrying another person, as in *Bowdell* v. *Parsons* (1), a promise to deliver certain goods, on request, was necessarily broken by a sale and delivery of the same goods to a third person. With a promise like the present this is not so clear; but assuming that, on the ground stated by Lord Denman in *Short* v. *Stone* (2), an actual marriage to another woman would be a breach, still no breach is shewn in the present case; the defendant's refusal, he being still unmarried, has created no obstacle to performance when the time arrives. Contracts of this kind are of a very different character from mercantile contracts, and are not construed strictly against, but are construed strictly in favour of those who are to be bound by them: *Box* v. *Day*, (3) *Atchinson* v. *Baker*, (4) and the same rule is applied to conditions with respect to marriage in wills: *Thomas* v. *Howell.* (5) The impossibility of assessing the damage upon any principle is decisive against the maintenance of the action.

Cur. adv. vult.

July 7. The following judgments were delivered.

KELLY, C.B. This is an action for a breach of promise of marriage, the promise being that the defendant would marry the plaintiff upon his father's death.

The first question is, whether this contract is really such that it is capable of being broken before the death of the father has taken place.

Nothing can be more certain, as a matter of fact, than that a promise to marry upon an event which has not yet happened is not broken by the defendant declaring that he will not perform his promise. If it can be called a breach at all, it is a promissory or prospective breach only; a possible breach, which may never

(1) 10 East, 359.
(2) 8 Q. B. at p. 369.
(3) 1 Wils. 59.
(4) 1 Peake Add. Ca. 103.
(5) Skin. 301, 319.

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occur, and not an actual breach. But it is contended that two decisions, to which I am about to advert, have established as a principle of law, that if one who contracts to do an act upon a future day, or upon the happening of a future event, the contract being such as to impose an obligation or condition upon the other contracting party, declare to him that he will not perform his contract, this not only releases the other from the performance of the condition or obligation imposed upon him, but entitles him to treat the contract, not merely as dissolved, but as broken, and to maintain an action for the breach. As applied to the contracts in the several cases in which this rule has been laid down, it is obviously reasonable and just, as far as it gives the right to maintain an action for damages under the circumstances of each case. But to say that the contract is broken, is simply to utter an untruth. One contracts in 1870 to pay to another 1000*l.* on the 1st of January, 1871. To say that the contract is broken before the year 1870 is at end is undeniably and self-evidently untrue. It seems equally clear and uncontrovertible in fact, that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive. Yet these decisions have now made it law, that a promise to do an act at a future day, or upon an event which has not yet occurred, is broken by a declaration to the promisee that it will be broken or will not be performed. And we are bound by these decisions, one of them having been pronounced in the Exchequer Chamber. It is necessary, therefore, to consider whether their authority extends not only to the contracts to which they related, and others of the like nature, but to a contract of a totally different character, and peculiar to itself, like a contract to marry.

A promise of marriage has been well distinguished from other contracts in an admirable judgment delivered by my very learned and eminent predecessor on this Bench, Sir Frederick Pollock, in the case of *Hall* v. *Wright* (1), in the Exchequer Chamber; and we have only to consider these late decisions to see how well-founded are the observations there made.

Hochster v. *De la Tour* (2), is the leading case upon the subject. In that case the defendant promised to employ the plaintiff as courier,

(1) E. B. & E. at p. 793.

(2) 2 E. & B. 678; 22 L. J. (Q.B.) 445.

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on and from the 1st of June, for three months then next following; and having, before the month of June arrived, given notice to the plaintiff that he would not perform his contract, and that the plaintiff was at liberty to enter into any other engagement, the plaintiff, alleging that he was exonerated from his contract, but had been ready and willing to perform it until exonerated, brought his action on the 21st of May, and, averring that the defendant had broken his contract, was held entitled under these circumstances to recover. In that case, as in the case now before the Court, it is impossible not to see that the defendant, at the time of action brought, had not de facto broken his contract, inasmuch as the promise to do an act on the 1st of June is not, and cannot be, broken by anything done or not done on the 21st of May: but the decision of the Court was otherwise, and it was held in effect that, the defendant having exonerated the plaintiff from the performance of his part of the contract, had put an end to it, or enabled the plaintiff to consider it at an end; and it was there determined that this declaration by the defendant that he would not perform the contract was itself a breach of the contract, and entitled the plaintiff to bring the action at once for such breach. The judgment of the Court as delivered by Lord Campbell, after first correctly stating the question, except that the statement assumes, or rather asserts that the renunciation of the contract was a breach of it, proceeds to refer to the case of *Short* v. *Stone* (1), treating it as a case of a promise to marry on a future day (whereas it was in fact a promise to marry within a reasonable time after request) and then refers to the cases of *Ford* v. *Tiley* (2), and *Bowdell* v. *Parsons* (3), as authorities in favour of the plaintiff.

Short v. *Stone* (4) merely decides that if a man who has promised to marry the plaintiff within a reasonable time after request, marry another woman, an action is maintainable against him for a breach of the promise without any averment of a request or that a reasonable time had elapsed after a request. It would be obviously absurd to require a request by the plaintiff to marry her, when, the defendant having married another woman, compliance with the request would be an act of bigamy. The declaration in that case

(1) 8 Q. B. 358.
(2) 6 B. & C. 325.
(3) 10 East, 359.
(4) 8 Q. B. 358.

therefore having, by the averment that the plaintiff had married another woman, shewn, though informally, a dispensation with the request, the case itself was merely a decision that, upon a promise to marry the plaintiff, it is a breach to marry another woman. Then *Ford* v. *Tiley* (1), which was the case of a contract to execute a lease for a certain term from a future day, and where the defendant had executed a lease for the same term to another than the plaintiff; and *Bowdell* v. *Parsons* (2), where the defendant had contracted for the delivery of a quantity of specified goods to the plaintiff on a future day, and before that day had sold and delivered them to another person, only shew that an act which renders the performance of a contract at a future day impossible may be the subject of an action before the day arrives. These cases are no authority at all for the proposition, that a declaration by the defendant that when the event shall have happened upon which he has promised to do an act, he will not perform his promise, amounts in itself to a present breach of the promise upon which an action may be at once maintained. In the case of *Emmens* v. *Elderton* (3), which is next referred to, defendant had engaged the plaintiff to act as solicitor, for a certain amount of salary and for a year certain, and had dismissed him before the year had expired; and this dismissal was held by the House of Lords to be a breach of the contract to employ the plaintiff for a whole year, and so the action was held maintainable. After dealing with these cases, the judgment as delivered by Lord Campbell will be found, when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June, and lose the opportunity of obtaining another engagement, or to accept any other engagement that might be offered to him and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement.

In the *Danube and Black Sea Company* v. *Xenos* (4), the defendant

(1) 6 B. & C. 325. (2) 10 East, 359. (3) 4 H. L. C. 624.
(4) 11 C. B. (N. S.) 152; 31 L. J. (C. P.) 84.

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contracted with the plaintiffs to receive certain goods on board a ship in London on the 1st of August, and convey them to a distant port. In the month of July he gave notice to the plaintiffs that the contract had been entered into by an agent without his authority, and that he would not be bound by it. At a later period, but before the 1st of August, on the plaintiffs formally insisting upon the contract, the defendant again denied that he was bound by it, and repeated his refusal to receive the goods, tendering another contract to the plaintiffs, which he declared himself willing to enter into. On the 1st of August the defendant offered to receive the goods, but without declaring upon which contract he proposed to receive them, and without revoking his repudiation of the original contract. The plaintiffs, having in the mean time entered into a contract with the owner of another ship, brought their action against the defendant for a breach of contract in not receiving the goods. This case, upon the facts, may be distinguished from *Hochster* v. *De la Tour* (1) inasmuch as the refusal to accept the goods under the original contract, though made before, was continued until and after the 1st of August, when the contract was to have been performed, and the action was not brought until after the 1st of August; so that the Court might well hold that the defendant had committed a breach of contract by continuing the refusal and the repudiation until after the 1st of August. But, undoubtedly, Erle, C.J., observes in this case (2), and it seems to have been the principle upon which the judgment of the Court proceeded, that "where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action." And this decision was affirmed, though without any formal judgment, and with no reasons given (3), by the Court of Exchequer Chamber. Such a state of circumstances as existed in both these cases no doubt renders it reasonable that the law should afford some relief to one who has been willing to perform his part of the contract, but finds himself reduced to the one or

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) 11 C. B. (N. S.) at p. 176; 31 L. J. (C.P.) at p. 91.

(3) 13 C. B. (N. S.) 825; 31 L. J. (C.P.) 284. See, however, the observations made during the course of the argument by Cockburn, C.J., Crompton, J., Pollock, C.B., and Wilde, B.

the other of the above alternatives, by the wrongful determination of the other contracting party to break his contract when the time for its performance shall arrive. I think, however, that it is to be regretted that in such a state of things a court of law should not have confined itself to the decision that the plaintiff might maintain a special action for damages, setting forth in a declaration appropriately framed, and with proper but true averments, the real facts of the case, and the renunciation on the part of the defendant of the contract into which he had entered; and the damage resulting to the plaintiff in either course of action which he might adopt in consequence of that renunciation. There might be a considerable difficulty in framing such a declaration; but I cannot think that the Court, in order to escape that difficulty, should have introduced a fiction into this branch of the law, which, when their decision related to a contract of a totally different nature and character from that upon which it proceeded, such as a promise to marry, might be productive of great injustice, and of anomalies and inconsistencies in the law to which their attention can hardly have been directed. Supposing, however, that we are bound to hold these decisions as binding upon us, with respect to all such contracts as those upon which they were founded, the question which we have to consider in the case before us is, whether it is our duty to apply that decision to this action for an alleged breach of promise to marry the plaintiff upon or after the death of the defendant's father.

It may be observed upon the case itself of *Hochster* v. *De la Tour* (1), that it is not only unsupported by any previous authority, but directly opposed to the principle of several cases to which it is now necessary to advert. In *Leigh* v. *Paterson* (2), upon a contract to deliver tallow in all December, the defendant, in October, gave notice to the plaintiff that he could not deliver the tallow at all, and, in fact, renounced the contract. Action brought; judgment by default; and upon the writ of inquiry the jury were told that the defendant, having put an end to the contract in October, the plaintiff ought not to be permitted to lie by and try the market, and that, if he could have purchased tallow

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) 2 J. B. Moore, 588; 8 Taunt. 540.

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in October at a less price than in December, he was bound to do so. The jury assessed the damages accordingly. But upon the case coming before the Court, the rule for a new trial was made absolute, Dallas, C.J., observing (1), that "the contract was mutually made between the plaintiff and defendants, and it can therefore only be dissolved by the mutual consent of both parties;" and the plaintiff was held entitled to recover the difference between the price contracted for and the price on the 31st of December. It was indeed observed by the Court that, had the plaintiff assented to the contract being put an end to in October, it might have had the effect of terminating it, but it is nowhere suggested that the contract would thereupon be broken, or that the plaintiff could then have maintained an action for the breach of it.

Phillpotts v. *Evans* (2) is to the same effect. There, upon a contract to accept wheat, the defendant gave notice before the time for the delivery that he would not accept it. Afterwards, when the wheat arrived, the delivery was offered to the defendant. He again refused to accept it. The Court held that the damages had been correctly assessed at the difference of the contract price and the price when the wheat was to be delivered. And Parke, B., in that case expressly observes, "if Mr. Richards (counsel for the defendant) could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then, perhaps, the proper measure of damages would be according to the price at the time of the notice; but I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait for the arrival of the time for the delivery of the wheat, to see whether the defendant would then receive it. . . . The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is that he will be ready and willing to receive the goods, and to pay for them at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them. It was a mere nullity, and it was perfectly in his power to accept them nevertheless; and, vice versâ the plaintiffs could not sue him before."

(1) 2 J. B. Moore, at p. 591; 8 Taunt. at p. 541. (2) 5 M. & W. 475.

The same rule was adopted in the case of *Startup* v. *Cortazzi*. (1) The notice "amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the mean time and rescinds the contract." These latter words shew, indeed, that the plaintiff may agree to rescind the contract; but it does not follow, and it would not, I think, be a consequence resulting from the rescission of the contract, that the plaintiff could create a right of action against the defendant upon such rescission without his consent. The parties to a contract may rescind it if they will, and with or without conditions; but neither can, by a rescission of the contract, impose a condition upon the other to which he is not a consenting party. In *Ripley* v. *McClure* (2) the contract was to deliver tea upon the arrival of a ship at Belfast, and the question, upon a long correspondence between the parties, was, whether the defendant had refused to accept the tea so as to entitle the plaintiff to maintain the action. There was evidence of what was termed a refusal before the arrival of the ship, but which, in effect, was no more than a declaration that he would not accept the tea when it should arrive; but there was evidence also of a continuance of this refusal until after the arrival of the ship. There was likewise a question whether the defendant had waived the delivery, or an offer to deliver the tea, when the ship had arrived. Upon the whole case the plaintiff was held entitled to recover, upon the ground that the defendant had refused to accept before the arrival of the ship, and that *the refusal continued till after its arrival;* and that he had waived the actual delivery or an offer to deliver; and in delivering the judgment of the Court upon the case, Parke, B., observes (3): "It was contended for the defendant that, to constitute a breach of the contract, *a refusal at any time* was insufficient; it must be a refusal after the arrival of the cargo; and that the supposed refusal in July . . . . which was long before the contract to buy became absolute, was no breach, and nothing more than the expression of an intention to break the contract, not final, and capable of being retracted. And we think that if the jury had been told that the refusal *before the arrival of the cargo* was a breach, that would have been incorrect. We think that point rightly decided

(1) 2 C. M. & R. 165.

(2) 4 Ex. 345.

(3) 4 Ex. at p. 358.

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in *Phillpotts* v. *Evans*." (1) These cases, but especially the two last, seem to me to establish the proposition, that the determination to break a contract to be performed at a future day, and notified by the one to the other of two contracting parties, does not in itself amount to a breach of the contract. It may, indeed, amount to a waiver of performance of conditions precedent; it may entitle the other contracting party to treat the contract as rescinded and at an end; but I think it the result of these decisions, and that such is the law, that it does not entitle the contracting party to treat a contract not merely as at an end, but broken, by him who does no more than declare his intention or his determination to break it.

But when we consider the effect of this doctrine, if applied to a promise of marriage in relation to the question of damages, we find that effect is to substitute for the contract which the parties have really entered into another contract which they have never entered into and never contemplated; the damages resulting from the breach of the one being totally different from those which may be sustained from the breach of the other. We may suppose a case in which the damage to the plaintiff from the refusal of the defendant to marry her now would be the loss of marriage between a young woman of twenty and a young man of thirty, both in youth and health; and so of a union that might endure for a long lifetime. The defendant might now be possessed of an ample fortune, and might occupy an elevated position in society. The character of the plaintiff might be spotless; the promised marriage matter of notoriety; and every circumstance might concur to render the match at once desirable and important to the plaintiff, and to enhance the damages which a jury would be properly disposed to award for a breach of the engagement. And if the expression of a determination to break the contract at a future time is to be taken to be a breach of it now, very large damages might be awarded accordingly. Whereas, when the time should have arrived at which, according to the contract really entered into, the plaintiff would be entitled to the performance of it, the plaintiff might be sixty and the defendant seventy years of age. The plaintiff might have lost her health or her character, and the defendant might have lost, besides his health, his fortune and his

(1) 5 M. & W. 475.

rank in life, and the whole circumstances of the parties have become such as that no jury could justly give more than nominal damages for the breach of the contract. Or the plaintiff, or the defendant, or both, might have died before the father, so that the contract could never really have been broken at all.

Upon a contract for the delivery of goods, or an engagement to act as courier, or to receive goods on board a ship about to arrive and to convey them to another port, where the time for the performance is fixed, or may be made the subject of reasonable computation, and where all the circumstances attending the performance or non-performance of the contract are capable of being foreseen or ascertained, and made the subject of consideration by a jury in estimating the damages, no difficulty can arise in assessing the amount, whether they are to be calculated as at the time agreed upon for the performance of the contract, or at some earlier period when the contract may have been renounced or rescinded. In *Hochster* v. *De la Tour* (1) the damages were easily ascertained, whether the action should be taken to have accrued at the time when the services of the plaintiff as courier were to have commenced, or at the earlier period when the defendant gave notice that he would not perform his contract. So, in the *Danube and Black Sea Co.* v. *Xenos* (2) there was no difficulty in ascertaining the damages which the plaintiff had really sustained, whether they were taken to have been recoverable when the contract was renounced, or at the time when it ought to have been performed. But in the present case, where the contract is to marry upon the death of the defendant's father, and the renunciation upon which it is supposed that the right of action accrues is made while the father is yet alive, it is absolutely impossible to do more than merely conjecture the damages which would have been sustained if no renunciation of the contract had ever been made, and the breach had taken place upon the death of the father.

As already observed, the age, the condition in life, the fortune, the character and conduct, the state of health, the expectations and prospects of both parties, may each and all be widely different now from what they may be at the father's death, to say nothing

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) 11 C. B. (N.S.) 152; 31 L. J. (Ex.) 84.

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of the possibility that the death of one of the parties may put an end to the contract while he is yet alive. It appears to me, therefore, quite obvious that it would be a self-evident untruth to say that the plaintiff has sustained damage from a breach of the defendant's contract to marry her at the death of a man who is now alive; and that the damage which she has really sustained arises merely from the painful and embarrassing position in which she has been placed by the declaration made to her by the defendant that he never will marry her. I think also that this declaration differs altogether from the repudiation or renunciation of the contract in the cases cited in this, that in the case of a promise of marriage, a man may repent and retract such a declaration the day after it is made, or before any mischief results from it, and the parties may be reconciled, and the promise afterwards performed in strict conformity to the contract.

Upon what principle the jury have assessed the damages in this case we can only conjecture, but it cannot have been upon an estimate of the damages that might have been sustained upon a failure to marry at the death of the father, for no materials exist for forming a judgment as to the state of things that may exist at that period. And if they have been estimated upon the loss of marriage at the present time, they have been awarded upon the supposed breach of contract which was never made.

I am far from saying that it would not be reasonable and just to hold that a special action for damages, adapted to the circumstances in each particular case, is and ought to be maintainable upon such a declaration of intention, and upon notice by the party aggrieved that she accepted it, and agreed to rescind the contract, subject to her right of action for having been wrongfully compelled by the conduct of the defendant, either to relinquish the contract and treat it as rescinded, or to abide by it under the disadvantages imposed upon her by the defendant's declaration that he would never perform it. It seems to me, therefore, upon the whole, that we cannot sustain this verdict without falling into the error of mistaking the renunciation for the breach of the contract. But I think we may hold that the defendant, by renouncing the contract, has entitled the plaintiff to elect whether she will accept the renunciation, thus putting an end to the contract, and bring a

special action on the case (in tort) for the wrong done by the act of renouncing; or whether she will treat the renunciation as a nullity, and, insisting upon the contract, await the death of the father; when, if the promise be not performed, she may bring her action for the breach, which will then, and not till then, have been really committed. If such be the decision of the Court the proper course will be to grant a new trial with liberty to both parties to amend the record as they may be advised. But if the plaintiff shall elect to abide by the record as it stands, I am of opinion that the rule should be made absolute to arrest the judgment.

MARTIN B. Before *Hochster* v. *De la Tour* (1) I would have concurred in this judgment; but I am unable to distinguish the two cases, and I think the correct course would be to give judgment for the plaintiff, and leave the defendant to bring error.

CHANNELL B. I concur in the judgment which the Lord Chief Baron has delivered, so far as it decides that the present action is not maintainable; and if the plaintiff chooses to act on the suggestion thrown out in it and amend, I have no objection to that course being taken. I will only add, that, *Hochster* v. *De la Tour* (1) being the decision of a Court of co-ordinate jurisdiction, I feel bound by it, and do not wish anything said in this case to lead to a doubt of the correctness of that decision as applicable to cases of that description. But I cannot agree to its application to the case of a breach of promise of marriage.

The case stood over for the plaintiff to elect whether to abide by the declaration or to amend (2).

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) The form of action suggested by the Lord Chief Baron, resting not upon a breach of contract, but upon a violation of the good faith involved in the contractual relation, seems analogous to that which is allowed in one or more parts of Germany to compensate for the capricious retractation of an offer before it has been matured into a contract. In his Lehrbuch der Pandekten (7th ed.) vol. 3, § 603 (p. 252), Von Vangerow, after laying down that, until the acceptance of an offer is actually communicated to the proposer, no contract is constituted, and that the offer may therefore until that time be retracted, says: "Although the proposer is not contractually bound before he learns of the acceptance, yet he has by his offer given rise in the receiver of it to a just expectation of concluding a contract; and if by an untimely retrac-

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Nov. 2. The plaintiff elected not to amend, and the Court accordingly made the

Rule absolute for arrest of judgment.

Attorneys for plaintiff: *Pitman & Lane.*
Attorneys for defendant: *Austen, De Gex & Harding.*

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tation of his offer he defeats this expectation, he has undoubtedly made himself guilty of an offence against the good faith which is to be observed in all contractual dealings, and is therefore liable to pay damages by way of compensation, naturally, however, only to the extent of what is called (by Ihering) the negative interest in the contract [i. e. ut consequatur quod interfuit ejus ne deciperetur; see vol. i. § 109, p. 166.] This doctrine is now very generally received, although views differ as to the foundation of such a claim for indemnification." The author refers, amongst others, to Thöl, who says (Handelsrecht, vol. i., § 57, p. 362): "The proposer who retracts his offer under circumstances in which, but for the retractation, a contract would be constituted between him and the person to whom he made it, must indemnify the latter for all the loss which he suffered in consequence of the presumption that the former would abide by his offer. For he has, in point of honesty and good faith, a right to this presumption."

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ASSENT OF CREDITORS—*continued.*

that purpose." A deed was afterwards executed on the 7th of August, and registered on the 11th, under s. 192 of the Bankruptcy Act, 1861, by which the debtor covenanted to pay the composition by instalments of 2*s.* 3*d.*, 2*s.* 2*d.*, and 2*s.* 3*d.*, at three, six, and nine months from the date of registration, and to deliver promissory notes for the same within fourteen days of the registration, the notes for the two last instalments to be signed by the debtor and W. H.:—*Held*, that the deed was not duly assented to,—first, because the assents did not state *how* the instalments were to be secured; secondly, because they did not state the point of time from which the periods of three, six, and nine months were to be reckoned; and thirdly, because they were not acted upon within a reasonable time. BIRKS *v.* CLARKE - - 197

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COMPENSATION UNDER LANDS CLAUSES ACT, 1845 — *Lands compulsorily Taken — Notice requiring Possession—Tenant from Year to Year—City Improvement Act*, 1847 (10 *&* 11 *Vict. c. cclxxx*), *s.* 34.] By s. 121 of the Lands Clauses Consolidation Act, 1845, if lands in the possession of a tenant from year to year are taken compulsorily, and such person is required to give up possession before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in

COMPENSATION UNDER LANDS CLAUSES ACT, 1845—*continued.*
such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain. Under a local Act, incorporating the above section, the defendants, in November, 1865, served upon the plaintiff, who held certain premises as yearly tenant, a notice stating their intention to take the premises, and requiring possession in six months. In fact, possession was not taken by the defendants until 1867, and the plaintiff meanwhile remained in possession, and continued to carry on his business upon the premises. In January, 1867, the defendants took an assignment of the interest of plaintiff's landlord (the lessee for a term of the premises), but no landlord's notice to quit was ever given to the plaintiff. In February, 1867, the defendants demanded immediate possession of the plaintiff's premises, declining to pay any compensation, and, upon refusal, obtained possession under a provision of their local Act which, however, required that no such possession should be taken until payment or deposit of purchase or compensation money should have been made. The plaintiff having sued them in trespass:—*Held* (affirming the judgment of the Court of Exchequer), that the plaintiff was entitled to compensation; and that the defendants had, therefore, not complied with the provisions of their local Act, and were liable in this action. *Reg.* v. *London and Southampton Ry. Co.* (10 Ad. & E. 3) commented on. CRANWELL *v.* THE MAYOR, &c., OF LONDON - - - **Ex. Ch. 284**

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See RENEWAL OF BILL.

CONTRACT BY AGENT — *Broker — Contract of Sale.*] A broker cannot sue in his own name upon contracts made by him as broker. The plaintiff, a broker, signed and delivered to the defendants a bought-note for cotton in the following form, "I have this day sold you on account of T., &c. (Signed) E. F., broker":—*Held*, that h was not a contracting party, and could not sue the defendants for breach of the contract in refusing to accept the cotton. FAIRLIE *v.* FENTON - **169**

2. —— *Agent signing Contract in his own Name —Foreign Principal.*] A person signing a contract in his own name, without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words expressly or by necessary implication shewing that he only signs as agent. The defendants signed a contract for the sale of wheat in the following form:—"Sold A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., of Dantzig), &c. (Signed) Walker & Strange:" — *Held*, that they were personally liable upon the contract. PAICE *v.* WALKER **173**

CONTRACT OF SALE—Agent - - **169, 173**
See CONTRACT BY AGENT. 1, 2.

—— "Cargo" - - - - **179**
See "CARGO."

CONVERSION—Legacy duty - **Ex. Ch. 102**
See LEGACY DUTY.

COPY—Policy—Stamp - - - **155**
See DUTY OF JUDGE.

CORRUPT PRACTICES—Election—Commission
See ADJOURNMENT OF COURT. [21

COSTS—County Court Appeal - - **16**
See COUNTY COURT APPEAL.

—— Taxation - - - - **17**
See TAXATION OF COSTS.

—— Writ of inquiry - - - - **201**
See COSTS ON WRIT OF INQUIRY.

—— Regula Generalis, T. T., 1870, as to allowance of two counsel on writ of inquiry—*See* Law Rep. 5 Q. B. 6[illegible]9.

COSTS ON WRIT OF INQUIRY—*Two Counsel—"Good Jury."*] On taxation of the plaintiffs' costs at the trial of a writ of inquiry to assess damages, in an action of negligence arising out of a railway accident, the master allowed costs for two counsel. On a rule to review the taxation, the Court declined to interfere with the master's discretion. The master also allowed the payment of special jury fees to a "good jury":—*Held* (following the case of *Vickery* v. *London, Brighton, and South Coast Ry. Co.* (Law Rep. 5 C. P. 165), (Martin, B., doubting),) that the allowance was right. VINES *v.* THE LONDON, B., AND S. C. RY. CO. FROST *v.* THE SAME - - - - - 201

COUNTY COURT APPEAL—*Costs—Misdirection by Judge of County Court.*] On an appeal from a county court, costs will not be refused to the successful appellant merely on the ground that the appeal has been rendered necessary by the misdirection of the Judge. *Gee* v. *Lancashire and Yorkshire Ry. Co.* (6 H. & N. 221; 30 L. J. (Ex.) at p. 18) not followed. CONYBEARE *v.* FARRIES - - - - - - 16

COURT — Adjournment — Corrupt practices at elections—Commissioners - - 21
See ADJOURNMENT OF COURT.

CREDITOR'S DEED—Assents - - 197
See ASSENT OF CREDITORS.

DAMAGE — Proximate cause—Two independent causes - - - 67, 204
See PROXIMATE CAUSE. 1, 2.

DAMAGES: *See* MEASURE OF DAMAGES.

DAYS — Computation of time — "From" — "Until" - - - - - 296
See INCLUSION OR EXCLUSION OF DAYS.

DEBTOR AND CREDITOR — Creditor's deed — Assent - - - - 197
See ASSENT OF CREDITORS.

DEVISE WITHOUT WORDS OF LIMITATION—*Will—Construction—Charge on Lands Devised.*] By a will, executed in 1834, a testator devised land to his son George without words of limitation, and further devised that if George should die before his wife, she should have "the above property and estate" for her life, "after whose decease" he devised the same to the five children of his son William, share and share alike, with a clause of survivorship in the event of any of them dying before the said "property and estate" should become vacant. He also gave personal estate to George, and charged both the personalty and realty with the payment of 100*l.*:—*Held*, that the devise to George was equivalent to an express devise of an estate for life, and that the children of William took vested estates as tenants in common in fee, in remainder after the life estates of George and his wife. BOLTON *v.* BOLTON 145

DISCRETION — Judge — Master — Taxation of costs - - - - - 17
See TAXATION OF COSTS.

DISEASE ARISING FROM ACCIDENT — *Life Insurance — Insurance against Accident — Construction of Policy—Secondary Cause—Disease "arising within the System."*] A policy of insurance against death from accidental injury contained the following condition:—"This policy insures against all forms of cuts, &c., when accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure against death arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death directly or jointly with such accidental injury)."—The assured on Saturday, the 24th of April, accidentally cut his foot against the broken side of an earthenware pan. On the Thursday following erysipelas supervened, and of that disease he died on the next Saturday. The erysipelas was caused by the wound, and but for the wound he would not have suffered from it. In an action by his executrix against the insurers to recover the amount insured:—*Held* (by Martin, Channell, and Cleasby, BB., Kelly, C. B., dissenting), that the insurers were protected by the above condition, and were not liable.—*Fitton* v. *Accidental Death Insurance Co.* (17 C. B. (N. S.) 122; 34 L. J. (C. P.) 28) discussed. SMITH *v.* THE ACCIDENT INSURANCE COMPANY 302

DISHONOUR—Bill—Notice - - - 59
See NOTICE OF DISHONOUR.

DISTRESS—Mortgage - - - 160
See NOTICE OF COMMENCEMENT OF TENANCY.

DUTY—Legacy - - - Ex. Ch. 102
See LEGACY DUTY.

—— Succession—Legacy - - 263, 275
See SUCCESSION DUTY. 1, 2.

DUTY OF JUDGE—*Evidence—Action on Policy of Insurance—Admissibility of Copy—Admission—Stamp.*] On the trial of an action on a policy of insurance, in which the existence of the policy was in issue, the plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they thereupon, with a view of proving that it had been duly executed, proceeded to put in a document purporting to be a copy of the policy which they had received from the defendant's broker. The defendant objected, and requested the judge to hear evidence to shew that no original policy was or ever had been in existence. The objection was overruled, and the alleged copy admitted. Later in the cause the defendant gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed, any policy at all executed, and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury found in the affirmative:—*Held*, that the question was rightly left to the jury, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties. STOWE *v.* QUERNER - 155

EASEMENT—Lands injuriously affected [Ex. Ch. 221
See LANDS INJURIOUSLY AFFECTED.

ELECTION—Corrupt practices—Commission
See ADJOURNMENT OF COURT. [21

EQUITABLE PLEA—*Trespass—Assault—Action by Husband against Lessee of Wife—Separate Estate—Practice in Equity in restraining an Action of Assault.*] To a declaration for, first, trespass to land; secondly, wrongful conversion of certain goods; thirdly, assault; the defendant pleaded, on equitable grounds—first, to the first count, that the plaintiff's wife was seised for her life of the land in that count mentioned, and being so seised was married to the plaintiff, whereby her estate in the land became vested in her and the plaintiff in her right; and afterwards by deed duly acknowledged the plaintiff and his wife granted the land to E., his heirs, &c., to hold the same, during the life of the plaintiff's wife, unto E., his heirs, &c., to the use of the plaintiff's wife and her assigns, to the intent that she and they should receive the rents thereof for her sole and separate use; that afterwards the plaintiff's wife let the said land to the defendant, and he entered and occupied under that lease, and that the alleged trespasses are his entry upon and occupation of the land under the terms of the lease. Secondly and thirdly, similar justifications to the counts for trover and assault:—*Held*, good pleas, inasmuch as in equity the plaintiff had no more right than a mere stranger to interfere with the wife's lessee. Allen *v.* Walker - - - - 187

ESTOPPEL IN PAIS—*Company—Liability of Company registering a Person as Shareholder—Certificate of Shares.*] The plaintiff bought and paid for shares in the defendant's company, and received duly executed transfers and share certificates, but was not registered as holder of the shares. The seller of the shares, being afterwards compelled to pay a call upon them, demanded repayment of the plaintiff, who required to have the transfer completed by registration. The plaintiff's name was thereupon entered on the register, and he received from the company a certificate certifying that he was owner of the shares. After and on the faith of such registration, and the delivery of the certificate, he repaid to the seller the amount of the call. The defendants afterwards discovered that before the plaintiff bought the shares they had been sold by a previous owner, by a duly executed transfer, to F., and they accordingly removed the plaintiff's name from the register, and substituted F.'s name. In an action by the plaintiff against the defendants for the removal of the plaintiff's name:—*Held*, that by the registration of the plaintiff, and the delivery to him of the certificate, followed by the payment by him of the call, the defendants were estopped from denying his title to the shares, and were liable to him for their value.—*In re Bahia and San Francisco Ry. Co.* (Law Rep. 3 Q. B. 584) followed. Hart *v.* Frontino and Bolivia, &c., Company - 111

EVIDENCE—Admissibility of umpire's evidence [Ex. Ch. 221

See Lands Injuriously affected.

—— Commission abroad—Costs - - 17

See Taxation of Costs.

—— Copy—Stamp - - - - 155

See Duty of Judge.

EXCISE PROSECUTION—*Notice of Appeal—Notice of Hearing—Service on Convicting Magistrates—7 & 8 Geo. 4, c. 53, s. 83—4 Vict. c. 20 s. 30.*] Where an adjudication by justices on an information under the Excise Act (7 & 8 Geo. 4, c. 53), is appealed against, notice of appeal must, by s. 83, be served on the justices:—*Held*, that service in court upon the clerk to the justices, in their presence, was good service. Notice of hearing of the appeal is also by 4 Vict. c. 20, s. 30, required to be served on the respondent at his place of abode:—*Held*, that such notice must be served on the person laying the information, and that service at the office of excise was insufficient, although by 7 & 8 Geo. 4, c. 53, s. 61, no information can be exhibited under the Act except by the order of the commissioners of excise. The Queen *v.* Eaves - - - - 75

FIRE INSURANCE — Computation of time — "From"—"Until" - - - - 296

See Inclusion or Exclusion of Days.

FISHERY—*Royal Franchise—Prerogative—Merger.*] The plaintiff claimed a several fishery in the river Tyne, which he proved to have existed from time immemorial, and, therefore, to have had a legal origin, having been originally granted by the Crown before Magna Charta to the prior and monks of a monastery. The defendants proved that, after Magna Charta, the original grantees had forfeited their "liberties and free usages," and contended that under these words a several fishery was included; and that the several fishery having been thus forfeited, had merged, and could not be regranted by the Crown:—*Held*, that the plaintiff was entitled to judgment.—Per Kelly, C.B., and Pigott B. The words "liberties and free usages" do not include such a franchise as a several fishery, and the question of merger therefore does not arise, there having been no forfeiture:—*Semble*, if there had been a forfeiture, there would have been no merger.—Per Martin, B. A several fishery does not merge upon its being resumed by the Crown, either by reason of forfeiture or otherwise. Northumberland *v.* Houghton - - - - - 127

FOREIGN PRINCIPAL—Contract - - 173

See Contract by Agent. 2.

FRAMES—Pictures—Carriers Act - - 90

See Carriers Act.

FRANCHISE—Fishery—Prerogative - 127

See Fishery.

FRIENDLY SOCIETY—Stamps on Securities 78

See Stamps. 1.

"FROM"—Computation of time - - 296

See Inclusion or exclusion of days.

GENERAL AVERAGE—*Ship—Expenses of getting off stranded Ship.*] Extraordinary expenses incurred in getting off a stranded ship, after the cargo has been removed to a place of safety, are not (in the absence of exceptional circumstances) general average to which the owner of cargo is liable to contribute, although the goods remain in the control of the shipowner's agents:—*Semble* (per Montague Smith and Hannen, JJ.), such expenses may, as against the owner of cargo so removed, be general average, if the goods cannot be otherwise carried forward, or only at a greater expense, or after a delay which would deteriorate the goods.—A ship laden with cargo, while still

GENERAL AVERAGE—*continued.*
in port, was driven ashore on the 5th of October; the cargo was unshipped, and by the 19th was landed and warehoused in safety under the superintendence and control of the shipowners' agents; an attempt was then made to float the vessel, which was abandoned on the 24th of November. Subsequently a second attempt was made which, on the 31st of December, succeeded; the ship was taken into port and repaired, and, after reshipping the cargo, proceeded to its destination: —*Held*, that the expenses of getting the vessel off were not general average to which the owners of cargo were bound to contribute. WALTHEW *v.* MAVROJANI - - - - **Ex. Ch. 116**

"**GOOD JURY**"—Costs on Writ of Inquiry **201**
See COSTS ON WRIT OF INQUIRY.

HIGHWAY—Trespassing—Rogue - **257**
See ROGUE AND VAGABOND.

HUSBAND AND WIFE—Action for injury to wife - - - - - **1**
See PRIVITY.

—— Assault—Trespass—Equitable plea - **187**
See EQUITABLE PLEA.

INCLUSION OR EXCLUSION OF DAYS—*Fire Insurance — Time — Computation — "From" — "Until."*] The plaintiffs insured their goods against fire with the defendants by a policy for six months, whereby it was provided that, from the 14th of February, 1868, until the 14th of August, 1868, and for so long after as the assured should pay the sum of 225 dollars, and the defendants, at the time above-mentioned, accept the same, the defendants' funds should be liable to make good losses by fire to the plaintiffs' goods. The plaintiffs intended to keep up this policy, and the defendants knew their intention, but the renewal premium was not demanded or paid on the 14th of August, 1868. On that day a fire took place which destroyed the plaintiffs' goods. The course of business between the plaintiffs and defendants was, that the defendants should come to the plaintiffs and demand the renewal premium:—*Held*, that under the terms of the policy the whole of the 14th of August was protected; and that the defendants were, therefore, liable for loss caused by a fire happening on that day. ISAACS *v.* THE ROYAL INSURANCE COMPANY **296**

INFRINGEMENT OF PATENT—*Infringement by Buying and Selling — Construction of Patent — Combination of New with Old Process.*] A patent was taken out by W. for "Improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein." The specification described a process of plaiting fabrics by means of a reciprocating knife in combination with a sewing machine. The first claim was for the general construction, arrangement and combination of machinery for producing plaited frills or trimmings *in a sewing machine;* the second was for the application and use of a reciprocating knife for crimping fabrics *in a sewing machine;* and the third, for the peculiar manufacture of crimped or plaited frills or trimmings "as hereinbefore described" and illustrated by a drawing. —A patent was afterwards taken out by O. for

INFRINGEMENT OF PATENT—*continued.*
"Improvements in doubling, folding or plaiting woven or other web fabrics, and in the machinery or apparatus employed therein or connected therewith." In this O. imitated with slight variations W.'s reciprocating knife, but did not combine its use with a sewing machine:—*Held*, first, that W.'s patent was not for the manufactured product, but for the process of manufacturing it.—Secondly, that W.'s patent was not limited to the manufacture of plaited fabrics by the knife *in combination* with a sewing machine.—Thirdly, that O.'s process was therefore an infringement.—The defendants bought and sold, in the way of trade, articles manufactured by O.'s process under the description of "Orr's patent machine-made plaiting," but they were not aware that O.'s process was an infringement, nor of the existence of W.'s patent:—*Held*, that they were guilty of an infringement of W.'s patent. WRIGHT *v.* HITCHCOCK [37

INJURIOUS AFFECTION—Land **Ex. Ch. 221**
See LANDS INJURIOUSLY AFFECTED.

INSURANCE: *See* FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.

INSURANCE ON BOTTOMRY BOND—*Shipping—Bottomry—Constructive Total Loss.*] The condition of a bottomry bond provided for its defeasance on payment of the amount of the bond, "or, in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed." The ship having become a constructive total loss, the bondholder, by a decree in the Admiralty Court (affirmed by the Privy Council) obtained payment to him of the proceeds of the ship, which had been paid into court, and which were insufficient; the Court holding that a bottomry bond was only discharged by payment or by an absolute total loss, and that the condition providing for defeasance on payment of such average as by custom should have become due, did not refer to the case of a constructive total loss.—In an action brought by the bondholder on a policy of insurance upon the bond:—*Held* (following *Thomson* v. *Royal Exchange Assurance Corporation* (1 M. & S. 30),) that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry, and (following the decision of the Privy Council in *Stephens* v. *Broomfield* (Law Rep. 2 P. C 516), that the condition of defeasance did not apply to the case of a constructive total loss. BROOMFIELD *v.* SOUTHERN INSURANCE COMPANY - - - - - - **192**

JUDGE—Duty—Stamp—Copy - - **155**
See DUTY OF JUDGE.

LAND—Lands Clauses Act, 1845 **Ex. Ch. 284**
See COMPENSATION UNDER LANDS CLAUSES ACT, 1845.

LANDLORD AND TENANT—Mortgage—Commencement of tenancy - - **160**
See NOTICE OF COMMENCEMENT OF TENANCY.

LANDS CLAUSES ACT, 1845: *See* STATUTES—8 VICT. C. 18.

LANDS INJURIOUSLY AFFECTED — *Award — Admissibility of Umpire's Evidence — Injurious Affection of Premises—Substitution of Roadway for River—Loss of "Amenity"—Lands Clauses Act*, 1845 (8 *Vict. c.* 18)—*Thames Embankment Act*, 1862 (25 *&* 26 *Vict. c.* 93)—*Taking of an Easement.*] The plaintiff was lessee of the Crown for the residue of a term of ninety-nine years from January, 1855, of a house and premises at Whitehall, together with all ways, easements, and appurtenances whatsoever thereto belonging, or "therewith, or with any part thereof, held, used, occupied, or enjoyed or accepted, reputed, deemed, taken, or known as part or parcel thereof." Until the execution of the works hereafter mentioned the premises abutted eastward on the river Thames, and were bounded by a wall along the whole length of which at high water the river flowed. In this wall was a gate, leading from the garden of the house to a causeway which ran out into the river to low-water mark. The causeway was, and for more than forty years had been, exclusively used by the plaintiff, for landing from the river various articles of household use, and for other purposes.—The defendants in 1863 commenced the construction of an embankment of the Thames, from Westminster to Blackfriars Bridge, under the powers given them by the Thames Embankment Act, 1862, and in the course of working they removed the plaintiff's causeway and a landing place connected with it, and entirely shut off the plaintiff from direct access to the river. Where the water had formerly flowed, a solid embankment, destined for a public highway, was constructed. The plaintiff thereupon gave the defendants, under the Lands Clauses Act, 1845, notice of arbitration and claim for compensation, stating in his notice that he was "owner" of the causeway as lessee thereof, and entitled as such lessee to the use and enjoyment of the landing-place, and of the easements, rights, and privileges belonging thereto, and connected therewith, and claiming compensation for the removal of the causeway and landing-place, and for the depreciation in value of his house and lands, and otherwise injuriously affecting them. The arbitrators referred the question of the amount of compensation payable to an umpire, who awarded 8325*l.* to the plaintiff "as and for compensation for his interest in the said causeway, pier, or jetty, and for shutting up the said landing-place, and for damage by the depreciation of the said house, &c., by the otherwise injuriously affecting the same by the execution by the defendants of the said works, and by the exercise of the powers of the said Act." The award was good on the face of it.—At the trial of an action on the award, the above facts having been proved, the umpire was examined on behalf of the defendants as to the mode in which he had arrived at the sum awarded. He stated that, amongst other items, he had given 5000*l.* for depreciation of the premises in value, and that in fixing that amount he had taken into consideration the loss of privacy and "amenity" which the plaintiff had sustained through the defendants' work:—*Held* (affirming the judgment of the Court below), first, that the plaintiff's interest in the causeway, as alleged in the notice of claim, was sufficiently established; and, secondly, that the evidence of the arbitrator was admissible.—*Held* (reversing the judgment of the Court below, by Blackburn, Keating, Mellor, and Lush, JJ., Willes, M. Smith, and Brett, JJ., dissenting), that the plaintiff was not entitled to the compensation given him for the general damage and depreciation in value of the premises caused by the execution of the undertaking, such damage and depreciation having in no way arisen from the severance of the land taken.—*Re Stockport Ry. Co.* (33 L. J. (Q.B.) 251) discussed. Duke of Buccleuch *v.* The Metropolitan Board of Works - **Ex. Ch. 221**

LEASE—Assignment—Implied contract between lessee and ultimate assignee - **132**
See Assignment of Lease.

—— "Further or other valuable consideration"
See Stamps. 2. [**82**

LEGACY DUTY (36 *Geo.* 3, *c.* 52)—*Money to be laid out in Land—Conversion.*] A testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C. (his eldest son) for life, remainder to C.'s first and other sons in tail male, remainder to J. (his second son) for life, remainder to J.'s first and other sons in tail male: remainder to his own right heirs.—C. and J. died without issue and intestate, and at the death of the survivor, S., a daughter of the testator, and his only other child, became entitled to the fund as heir at law of the testator, as well as of C. and J. The fund was never invested, and remained money at the death of S. No act had been done by any one amounting to an election to treat the fund either as money or as land, and E., a grandson of a brother of the testator, took the fund as heir at law:—*Held* (affirming the decision of the Court of Exchequer), that duty was payable by E. under the Legacy Duty Act (36 Geo. 3, c. 52). In the Matter of De Lancey's Succession **Ex. Ch. 102**

—— Succession - - - - **275**
See Succession Duty. 2.

LETTER OF CREDIT—*Bill of Exchange—Action by Drawer against Acceptor—Damages.*] The defendants, bankers at Liverpool, by their letter of credit to the plaintiffs, grain merchants at Alexandria and Liverpool, undertook to accept the drafts of the plaintiff's Alexandria firm, the plaintiffs undertaking to put them in funds to meet the bills at maturity, and the defendants receiving ½ per cent. for the accommodation. Bills were accepted by the defendants under this arrangement, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due, the defendants' bank stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying 2½ per cent. commission; they were also obliged to pay to the holders the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expense in telegraphic communications between Liverpool and Alexandria. In an action against the defendants for breach of the contract contained in their letter of credit:—*Held*, that the plaintiffs were entitled to recover the commission and the notarial and telegraphic expenses. Prehn *v.* The Royal Bank of Liverpool - - - - - - **92**

LIEN—Railway tolls - - - - 62
See Railway Tolls.

LIFE INSURANCE — Construction — Disease "arising within the system" - 302
See Disease arising from Accident.

LOSS—Marine Insurance—Bottomry - 192
See Insurance on Bottomry Bond.

MARINE INSURANCE—Stamp—Copy - 155
See Duty of Judge.

MARRIAGE—Breach of promise—Refusal before time for performance - - 322
See Promise of Marriage.

MASTER—Taxation of costs - - 17
See Taxation of Costs.

MEASURE OF DAMAGES—Letter of credit 92
See Letter of Credit.

MERGER—Royal franchise fishery - - 127
See Fishery.

MINE-OWNER—Compensation—Railway 6
See Compensation under Railway Clauses Act, 1845.

MISDELIVERY—Refusal by consignee to receive goods - - - - 51
See Refusal of Goods by Consignee.

MISDIRECTION—Judge of County Court—Costs of appeal - - - - 16
See County Court Appeal.

MORTGAGE—Landlord and tenant - 160
See Notice of Commencement of Tenancy.

NEGLIGENCE — Carrier — Refusal of goods by consignee - - - - 51
See Refusal of Goods by Consignee.

—— Proximate cause—Damage - 67, 204
See Proximate Cause. 1, 2.

—— Sale of goods — Action by husband and wife - - - - - 1
See Privity.

"NEW SUCCESSION"—Duty - - 263
See Succession Duty. 1.

NOTICE—Appeal in excise prosecution - 75
See Excise Prosecution.

—— Dishonour of bill - - - 59
See Notice of Dishonour.

—— Lands Clauses Act, 1845—Possession Ex. Ch. [284
See Compensation under Lands Clauses Act, 1845.

NOTICE OF APPEAL—Excise prosecution 75
See Excise Prosecution.

NOTICE OF COMMENCEMENT OF TENANCY—*Landlord and Tenant—Mortgagor and Mortgagee—Change of Relation—Proviso for Tenancy arising on Default in Payment by Mortgagor—Distress.*] By a mortgage deed it was provided that the mortgagor, in the event of his making default in payment of the sums advanced to him, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease. The mortgagor having made default, the mortgagees, without having given him any notice of their intention thenceforward to treat him as a tenant, distrained, after the lapse of more than a year from default, as for a year's rent in arrear:—*Held*, that, not having given him notice of their intention to treat him as a tenant, they were not entitled to distrain. Clowes *v.* Hughes - 160

NOTICE OF DISHONOUR—*Bill of Exchange—Time—Reasonable Diligence.*] A bill of exchange drawn by the defendant on and accepted by W. and indorsed to S., and by S. indorsed to the plaintiff, was presented to W. for payment at maturity and dishonoured. All the parties to the bill lived in London. The morning after its dishonour the plaintiff, who did not know where the defendant, the drawer, lived, applied to S. for information on the point. S. was from home, but at half-past five in the afternoon the plaintiff went to him again, and having obtained the address of the defendant, posted his notice of dishonour the same evening, but not till after six o'clock. The consequence was that it was not received that night, as it would have been in the ordinary course of post if posted before six o'clock.—In an action by the plaintiff as indorsee against the drawer, the jury found that the plaintiff had exercised a reasonable amount of diligence in giving notice of dishonour:—*Held*, that although it was not given in sufficient time to reach the drawer on the day after the bill had been dishonoured, it was not, under the circumstances, too late. Gladwell *v.* Turner - 59

PARLIAMENT—Corrupt practices at elections—Commissioners—Adjournment of Court [21
See Adjournment of Court.

PATENT—Infringement - - - 37
See Infringement of Patent.

PERFORMANCE OF CONTRACT—Refusal before time for performance - - 322
See Promise of Marriage.

PERILS OF THE SEAS—*Vendor and Purchaser—Condition Precedent—Receipt of Bills of Lading—Delivery of Cargo—Agreement that Purchaser shall bear Risks and Dangers of the Sea.*] The plaintiffs agreed with the defendant to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the purchaser takes upon himself all risks and dangers of the seas"; and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20s. a ton of 20 cwt. weighed on board during delivery.—The vessel was lost during the voyage by risks and dangers of the seas, within the meaning of the agreement, and after the receipt by the defendant of the bills of lading. The plaintiffs having brought an action against the defendant to recover the value of the cargo:—*Held* (by Martin and Channell, BB., Cleasby, B., dissenting), that the clause, imposing on the defendant all risks and dangers of the seas, did not

PERILS OF THE SEAS—*continued.*
accelerate his liability to pay for the goods or to pay a sum equivalent to their value, but only relieved the vendors in a certain event from their liability to be sued for non-delivery, and that, the vessel never having arrived and the goods not having been delivered, the plaintiffs were not entitled to recover. CASTLE *v.* PLAYFORD 165

PICTURES—Frames—Carriers Act - 90
See CARRIERS ACT.

PLEADING—Trespass—Husband and wife—Equitable plea - - - 187
See EQUITABLE PLEA.

POLICY—Insurance—Computation of time—"From"—"Until" - - 296
See INCLUSION OR EXCLUSION OF DAYS.

—— Insurance—Stamp—Copy - - 155
See DUTY OF JUDGE.

POWER TO COMMENCE BUSINESS—*Company—Whole Capital to be subscribed for.*] A clause in the articles of association of a company registered under the Companies Act, 1862, provided that, when and so soon as 3000 shares in the company should have been subscribed for and allotted, the members of the company for the time being should be and continue associated for the objects of the company, and the regulations for the management thereof should be in force and binding on such members in like manner as if the whole of the shares into which the nominal capital was divided had been subscribed for and allotted. Before 3000 shares were subscribed for, the directors appointed the plaintiff engineer to the company. In an action against the company for the plaintiff's salary:—*Held*, that the clause was valid and effectual; that until 3000 shares were subscribed for, the directors had no power to make any contract for carrying on the business of the company; and that, therefore, the plaintiff could not maintain the action. PEIRCE *v.* JERSEY WATERWORKS COMPANY - - - 209

PRACTICE—Adjournment of Court—Commission—Corrupt practices - - 21
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—— Assault—Equitable plea - - 187
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—— Duty of judge at trial - - - 155
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PREROGATIVE—Franchise fishery - 127
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PRINCIPAL AND SURETY—Liability of ultimate assignee to lessee - - - 132
See ASSIGNMENT OF LEASE.

PRIVITY—*Husband and Wife, Action by—Injury caused to Wife arising out of Sale of Goods to Husband for her use—Scienter—Negligence as a Tradesman—Selling Goods of Deleterious Quality.*] The plaintiffs, J. G. and his wife E. G., by their declaration alleged that the defendant, in the course of his business, professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, without causing injury to the person using it, and to have been carefully compounded by him; that the plaintiff J. G. thereupon bought of the defendant a bottle of this hair wash to be used by the plaintiff E. G., as the defendant then knew, and on the terms that it could be safely so used, and had been carefully compounded. Breach, that the defendant had so negligently and unskilfully conducted himself in preparing and selling the hair wash, that by reason thereof it was unfit to be used for washing the hair, whereby the plaintiff E. G., who used it for that purpose, was injured. On demurrer:—*Held*, that the declaration disclosed a good cause of action. *Langridge* v. *Levy* (2 M. & W. 519; in Ex. Ch. 4 M. & W. 337), discussed. GEORGE *v.* SKIVINGTON - - - - - 1

PRIVITY—*continued.*

PROMISE OF MARRIAGE—*Breach of Contract by refusal to perform, the time for performance not having arrived.*] The defendant promised to marry the plaintiff so soon as his (the defendant's) father should die. During the father's lifetime, the defendant refused absolutely to marry the plaintiff, and married another woman. The plaintiff sued for breach of the promise, defendant's father being still alive:—*Held*, Martin B. dissenting) that the principle of *Hochster* v. *De la Tour* was not applicable to the case of a promise to marry, and that no breach had been committed. *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.), 455), discussed. FROST *v.* KNIGHT - - - - - 322

PROMISSORY NOTE—Variation - - 65
See VOLUNTARY AGREEMENT.

PROTECTED TRANSACTION IN BANKRUPTCY—12 & 13 *Vict. c.* 106, *s.* 133. By an agreement in writing between a guarantee society and H., after reciting that H. was about to enter the service of a gas company, the Guarantee Society agreed with H. to indemnify the gas company to the extent of 250*l.* against any loss that might occur through his dishonesty, and H. agreed with the Guarantee Society that if they should receive any notice of any irregularity, default, or claim intended to be made under the guarantee, it should be lawful for them by their officers, or any person authorized by them, to enter H.'s house, and take possession of his goods; and, in case they should be called upon to make any payment under the guarantee, to sell the goods for their own indemnification. The guarantee was given accordingly, and H. having afterwards been guilty of dishonest conduct, the gas company called upon the Guarantee Society to pay the sum guaranteed. Thereupon the society and the company by their authority, entered and seized H.'s goods. Meanwhile H. had committed an act of bankruptcy, but of that, at the time of entry and seizure, neither the Guarantee Society nor the gas company had notice. H. was subsequently adjudicated bankrupt, and his assignees brought an action against the Guarantee Society and gas company for the entry and seizure:—*Held*, that the agreement and the entry and seizure of H.'s goods under its provisions, constituted a "transaction" with the bankrupt protected by the 12 & 13 Vict. c. 106, s. 133, and that the plaintiffs were not entitled to recover. KREHL *v.* THE GREAT CENTRAL GAS CONSUMERS' COMPANY AND MUSIS (P. O.) - - - - - - 289

PROXIMATE CAUSE—*Damage—Remoteness—Injury resulting from Two Independent Causes—Measure of Damages—Negligence—Breach of*

PROXIMATE CAUSE—*continued.*

Contract or Duty.] The defendants, a gas company, contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside, to a meter inside, his premises. Gas escaped, from the pipe laid down under the contract, into the plaintiff's shop. The servant of a gasfitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it, with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's premises and stock. On the trial of an action against the defendants to recover for the injury sustained, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied, and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Upon these findings:—*Held*, that the plaintiff was entitled to recover, and that the defendants were not relieved from responsibility by the negligent act of the gasfitter's servant.—Per Kelly, C.B., and Pigott, B. The cause of action was the negligence of the defendants, from the consequences of which the intermediate negligence of a person not in the plaintiff's service could not relieve them.—Per Martin, B. The defendants' liability arose from their breach of contract in not supplying the plaintiff with a proper service pipe; and even if the person whose negligence was the immediate cause of the explosion had been in the plaintiff's service, the defendants would nevertheless have been liable. Burrows *v.* The March Gas and Coke Company - - - - - - 67

2. —— *Negligence—Natural Forces—Duty of Owner in Possession of Wrecked Vessel.*] The defendants' vessel being driven upon a sea wall became a wreck, and could not be removed otherwise than by breaking her up. Valuable property was on board, which would have been lost if she had been immediately broken up. The defendants removed the property with reasonable speed, and then broke up the vessel. During the period which elapsed between the time when she could have been first broken up and the time when she was broken up in fact, damage was done by the vessel to the sea wall on which she lay:—*Held*, that the defendants (assuming them not to have been guilty of any negligence), although remaining in possession, were only bound to use reasonable care and diligence in preventing the ship from damaging the sea wall, and were entitled to remove the property on board before breaking her up, and that having done so with reasonable speed they were not liable.—The defendants' vessel, owing to the negligence of their servants, struck on a sandbank, and becoming from that cause unmanageable, was driven by the wind and tide upon a sea wall of the plaintiffs', which it damaged:—*Held*, that the defendants were liable for the damage so caused. Romney Marsh *v.* Corporation of the Trinity House - - - - 204

RAILWAY—Refusal of goods by consignee. 51
See Refusal of Goods by Consignee.

RAILWAY TOLLS—*Carriers—Railways Clauses Act*, 1845 (8 *Vict. c.* 20), *s.* 97—*Construction—Lien.*] The 97th section of 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to the company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages. Wallis *v.* The London and S. W. Ry. Co. - - - - 62

RAILWAYS CLAUSES ACT, 1845 - - 62
See Statutes—8 Vict. c. 20.

REFUSAL OF GOODS BY CONSIGNEE—*Carrier—Involuntary Bailee—Negligence — Misdelivery.*] Carriers, after a refusal of the goods at the consignee's address, are involuntary bailees, and are only bound to act with reasonable care and caution with respect to the goods. The plaintiffs, acting upon a supposed order, forwarded goods by the defendants' line to the address of a company from which the order purported to come, but which had, in fact, ceased to carry on business. The defendants tendered the goods at the company's late place of business, and the goods were refused. The defendants took back the goods to the station, and posted an advice note to the company, requesting instructions for their delivery. A few days afterwards N., the person who had written and sent the order in the company's name, brought to the station the advice note and a delivery order purporting to be signed by himself for the company, and obtained delivery of the goods. Afterwards, another bale of goods, similarly consigned by the plaintiffs in pursuance of the same order, was obtained by N. from the defendants under similar circumstances, except that no advice note had in this case been sent:—*Held*, that it was a question for the jury, whether the defendants had acted with reasonable care and caution with respect to the goods after their refusal at the consignee's address; and the jury having found for the defendants, the Court refused to disturb the verdict. Heugh *v.* The London and N. W. Ry. Co. - 51

REGULÆ GENERALES—M. T., 1869, and T. T., 1870—Debtors Act, 1869—Taxation of costs—Writ of inquiry—Two counsel—*See* Law Rep. 5 Q. B. 669

REMOTENESS OF DAMAGE—Two independent causes - - - - 67, 204
See Proximate Cause. 1, 2.

RENEWAL OF BILL—*Agreement to Renew—Time to apply for Renewal.*] The defendant accepted the plaintiff's draft at six months, the plaintiff agreeing in writing to renew the bill, if circumstances should prevent the defendant from meeting it at maturity. The defendant made no application for renewal during the currency of the bill; but on plaintiff's presenting it for payment shortly after it became due, he claimed to have it renewed according to the agreement, circumstances having in fact prevented him from meeting it. In an action on the bill:—*Held*, that defendant was not bound to apply for a renewal during the currency of the bill; but that it was sufficient if he did so within a reasonable time after it became due. Maillard *v.* Page. - - - - 312

ROGUE AND VAGABOND—*Frequenting Highway with intent to commit a Felony—5 Geo. 4, c. 83, s. 4.*] A public highway is not necessarily a "place of public resort," within the meaning of 5 Geo. 4, c. 83,

ROGUE AND VAGABOND—*continued.*

s. 4. G. T. was committed to gaol by justices, under a warrant of commitment, which stated him to have been convicted (under 5 Geo. 4, c. 83, s. 4), as "a rogue and vagabond, for that he the said G. T., being a suspected person, did frequent a certain public highway . . . with intent to commit a felony":—*Held*, that the commitment was bad, for not shewing that the highway *led* or *adjoined* to any "river, canal, &c.," or to any "place of public resort," or that it was itself a place of public resort. *In re Jones* (7 Ex. 586; 21 L. J. (M.C. (116) followed; *Reg.* v. *Brown* (17 Q.B. 833) not followed. Where a prisoner is brought up on a writ of habeas corpus, and the return shews a commitment bad on the face of it, the Court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up and amending the commitment by it. *In re* George Timson - - 257

ROYAL FRANCHISE—Fishery - - 127
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—— M. T. 1869 and T. T., 1870—Debtors' Act, 1869—Taxation of costs—Writ of inquiry—Two counsel—*See* Law Rep. 5 Q. B. [669

SALE—Contract—"Cargo" - - - 179
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SCIENTER—Sale of goods—Action by husband and wife - - - - 1
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SETTLEMENT—Stamps - - - 85
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See Insurance on Bottomry Bond.

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See General Average.

SOCIETY, FRIENDLY: *See* Friendly Society.

STAMPS—*Exemption from Duty—Friendly Society—Investment of the Funds of a Friendly Society in Securities*—18 & 19 *Vict.* c. 63, s. 37.] The Friendly Societies Act (18 & 19 Vict. c. 63, s. 37) does not exempt from stamp duty securities on which the funds of a friendly society are invested. In the Matter of the Royal Liver Friendly Society. [78

2. —— *Lease—"Further or other Valuable Consideration"—Building Lease*—17 & 18 *Vict.* c. 83, s. 16.] A lease made in consideration of a rent, and also of a covenant to complete houses, is a lease made "for a further or other valuable consideration" besides the rent, with in 17 & 18 Vict. c. 83, s. 16, and is chargeable with a deed stamp

STAMPS—*continued.*

beyond the ad valorem duty. In the Matter of Bolton's Lease. - - - - 82

3. —— *Settlement—Money to be laid out in Land*—13 & 14 *Vict.* c. 97, *Sched.* "*Settlement.*"] By articles of settlement it was recited that part of the property to be settled consisted of lands purchased (under a power), to the amount of 52,000*l.*, out of trust moneys subject to an earlier settlement, and held by trustees on trust for sale, and in the mean time to be considered in equity as money, and, as well as the proceeds of sale, to be subject to the trusts of the settlement; and it was agreed that the property should be settled (and as to the lands, without prejudice to the trust for sale), upon certain trusts, with a proviso that if, when the property (which was subject to a life estate), should become subject in possession to the trusts of the settlement to be executed, the lands should not have been sold, the trustees might, with the consent of the husband and wife, or the survivor, and afterwards at their own discretion, accept a conveyance of them in lieu of the trust moneys, upon the like trusts for sale, such power of sale not to be exercised during the lives of the husband and wife and the survivor, without their, his, or her consent:—*Held*, that the articles were not, under 13 & 14 Vict. c. 97, sched. "Settlement," subject to an ad valorem stamp duty on the 52,000*l.*, as a definite and certain principal sum to be laid out in the purchase of lands. In the Matter of Stucley's Settlement. - 85

—— Copy—Policy of insurance - 155
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STATUTES.

36 Geo. 3, c. 52 - - - Ex. Ch. 102
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5 Geo. 4, c. 83, s. 4 - - - 257
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7 & 8 Geo. 4, c. 53, s. 83 - - - 75
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11 Geo. 4, & 1 Wm. 4, c. 68, s. 1 - 90
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8 Vict c. 18, s. 121 - - Ex. Ch. 284
See Compensation under Lands Clauses Act, 1845.

—— c. 20, s. 81 - - - - 6
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—— —— s. 97 - - - - 62
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13 & 14 Vict. c. 97, sched. - - 85
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15 & 16 Vict. c. 57, s. 4 - - - 21
See Adjournment of Court.

16 & 17 Vict. c. 51, s. 15 - - - 263
See Succession Duty. 1.

—— —— ss. 14, 15, & 18 - - 275
See Succession Duty. 2.

STATUTES—*continued.*
17 & 18 Vict. c. 83, s. 16 - - - 82
See STAMPS. 2.
18 & 19 Vict. c. 63, s. 37 - - - 78
See STAMPS. 1.
25 & 26 Vict. c. 93 - - - Ex. Ch. 221
See LANDS INJURIOUSLY AFFECTED.

SUCCESSION DUTY—"*New Succession*"—16 & 17 *Vict. c.* 51, *s.* 15.] Tenant for life and tenant in tail under a settlement (father and eldest son), in 1855 barred the entail and settled the estates to their joint appointment, and subject thereto to the uses of the earlier settlement. In 1857 they appointed a term to a trustee, after the death of the tenant for life, on trust to raise 20,000*l.* for a younger son, and, by a subsequent deed of 1860, that sum was directed to be raised whether the son did or did not survive his father, the tenant for life. On the money becoming payable to the son upon the death of the tenant for life:—*Held*, that the sum of 20,000*l.* was not a succession which, after the Act, had become vested in the son "by alienation or by any title not conferring a new succession," within the 2nd clause of s. 15 of the Succession Duty Act, 1855, and that duty, at 3 per cent., was payable by the son as upon a succession derived from his brother. THE ATTORNEY-GENERAL *v.* LORD EUSTACE CECIL - - - - 263

2. —— *Succession Duty Act*, 1855 (16 & 17 *Vict. c.* 51), *ss.* 14, 15, 18—*Legacy Duty—Double Duty.*] By a marriage settlement made in 1829, a fund was settled, subject to trusts for the husband and wife during their lives, and for the children of the marriage, and to a testamentary power of appointment in the wife in default of issue, upon trust for the persons who would at the death of the wife have been entitled to the same, under the Statute of Distributions, in case she had died unmarried and intestate. The wife died in 1831 without issue and intestate, and her mother, H. D., became entitled to the fund under the ultimate trust. H. D. died in 1832, having bequeathed her property to executors, of whom the present defendants were representatives, on trust for certain legatees, from whom by the Legacy Duty Acts (36 Geo. 3, c. 52, and 55 Geo. 3, c. 184), duty became payable at 3 per cent. The husband died in 1868, and the bequests under the will of H. D. fell into possession. The trustees of the settlement paid succession duty at 1 per cent., as on a succession derived by H. D. from her daughter; the Crown claimed also legacy duty on the bequests by H. D. The defendants claimed to deduct the amount actually paid by the trustees, as wrongly claimed by the Crown, but paid the difference:—*Held*, that the Crown was entitled to the legacy duty only, and not to double duty. By Channell and Cleasby, BB.; that by ss. 14 and 18 of the Succession Duty Act, if H. D. had lived till after the Act came into operation, only one duty would have been payable and that by the 1st clause of s. 15 the same result ensued though she died before the Act. By Bramwell, B.; that s. 15 does not create or impose any tax, but only shifts the liability; that the section imposing the tax is s. 2; that H. D. having died before the Act, was not a successor within s. 2; that the executors were not within s. 2, as they had no "beneficial interest;" and

SUCCESSION DUTY—*continued.*
that if the executors took by a derivative title under the first branch of s. 15, they were within the provisions of the Act against double duty. By Kelly, C.B., that the 18th section did not apply, as there were two "acquisitions," one under the settlement and one under the will; but that the claim of the Crown to double duty was not made out. THE ATTORNEY-GENERAL *v.* LITTLEDALE AND OTHERS. - - - - 275

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SURETY—Liability of ultimate assignee to lessee
See ASSIGNMENT OF LEASE. [132

TAXATION OF COSTS—*Provisional Entry of Cause at Assizes—Appeal from Master—Costs in the Cause—Judge's Discretion—Reg. Gen., Mich. Term*, 1867—*Commission to Examine Witnesses abroad — Legal Advice — Letter of Instructions.*] In pursuance of an order for facilitating the entry of causes at the Lancashire assizes, the plaintiff's cause was *provisionally* entered for trial. Before the commission day proceedings were stayed, the defendants having obtained a commission to examine witnesses abroad. The commissioners were empowered to put questions, viva voce, in addition to written interrogatories; and, in order to aid them in the execution of their duty, a letter of instructions was sent to each of them by the plaintiff's attorneys, stating the facts of the case and the points in dispute between the parties, to which the evidence should be directed. The plaintiff, on the return of the commission, again entered the cause provisionally for trial at the assizes, but the defendants having withdrawn their pleas, the record was withdrawn and judgment for the plaintiff subsequently signed. On taxation, the master disallowed the costs incidental to the provisional entries of the cause for trial and to the letter of instructions:—*Held*, that he was wrong, and that the plaintiff was entitled to them as costs in the cause. The Reg. Gen., Mich. Term, 1867, provide (among other things) that the costs of an appeal at chambers from a master to a judge shall be in the judge's discretion. On an appeal by the defendants from a master's decision, refusing to allow a commission to issue, the judge made a special order, in effect reversing the master's decision, but made no order as to the costs of the appeal, which the master disallowed on taxation:—*Held*, that the master was right, and, in the absence of an express order by the judge, the costs of the appeal could not be recovered by the plaintiff as costs in the cause. MANN *v.* HARBORD 17

—— Writ of inquiry—"Good jury" - 201
See COSTS ON WRIT OF INQUIRY.

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VAGABOND—Frequenting highway - 257
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VARIATION—Promissory note - - 65
See Voluntary Agreement.

VENDOR AND PURCHASER—Agreement to bear perils of the seas - - - 165
See Perils of the Seas.

VOLUNTARY AGREEMENT—*Promissory Note—Subsequent Agreement—Variation in Mode of Payment—Consideration—Waiver.*] The defendant gave to J. M. a promissory note, whereby he promised to pay J. M. or order on demand, 520*l.* with interest, at the rate of 5 per cent. per annum. Afterwards a written agreement was entered into by the defendant and J. M., that the principal sum of 520*l.* should be repaid by quarterly instalments of 25*l.* with interest. In an action brought after the death of J. M., by his administratrix, to recover the whole amount for which the note was given:—*Held*, that the subsequent agreement between the defendant and J. M. was no defence, inasmuch as it was not founded on any valuable consideration. McManus *v.* Bark - - 65

WILL—Construction - - - 145
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—— "Further or other valuable consideration"
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*** For Regulæ Generales under the Debtors Act, 1869; and Regula Generalis as to the allowance for more than one counsel on the taxation of costs on writs of inquiry, see Law Rep. 5 Q. B. 669.

END OF VOL. V.

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.

B.L. 21/4/58